Journal of Air Law and Commerce

Volume 39 | Issue 1 Article 3

1973

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Michael C. McClintock

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Recommended Citation

Michael C. McClintock, *Skyjaking: Its Domestic Civil and Criminal Ramifications*, 39 J. Air L. & Com. 29 (1973)
https://scholar.smu.edu/jalc/vol39/iss1/3

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SKYJACKING: ITS DOMESTIC CIVIL AND CRIMINAL RAMIFICATIONS†

Michael C. McClintock*

There is no more pressing problem facing the world aviation community today than the problem of aircraft hijacking. From January 1 to July 31, 1972, there was a total of twenty-six skyjackings of American commercial airliners—a number equivalent to the total number of skyjackings in 1971. To deter and counter air piracy, the government and airlines of the United States have implemented an unprecedented program of security control. In this article, Mr. McClintock observes that even though the strict security measures and the "get tough" policy of the United States government have greatly reduced the number of skyjackings, the number of passenger injuries and deaths occurring as a result of skyjackings has correspondingly increased. After reviewing the available theories of liability against the hijacker, the airlines and the government, the author concludes that while the criminal law of skyjacking is becoming firmly established, civil liability is still maturing. In the future, the resourcefulness of the aviation bar will play a significant role in this development.

It is difficult to imagine a more frightening and dangerous event than armed piracy of a passenger aircraft in flight. The extreme penalty reflects the concern of Congress and at the same time enhances the probability that a desperate man will destroy the aircraft and the lives of all aboard rather than fail in his attempt . . . .[1]

† Adapted and updated by the author from M. McClintock, Aircraft Hijacking: Its Civil and Criminal Ramifications, April 1, 1971 (unpublished thesis in SMU Law School Library) [hereinafter cited Thesis].

* Assistant Professor of Law, Gonzaga University. B.A., J.D., University of Tulsa; LL.M., S.J.D. candidate, Southern Methodist University. Member of the Oklahoma Bar.

[1] United States v. Epperson, 454 F.2d 769, 772 (4th Cir. 1972) (defendant was arrested—for attempting to board an aircraft carrying a concealed weapon

THE SKYJACKING era began only a few years ago with a comic-opera aura of unexpected excursions to Havana. But that has now changed. Recent events reveal hijackings to be an ugly and dangerous matter. The ascendant reality is that every hijacking sets in motion a chain of events that contain chilling potential for disaster. The continual acts of air violence increasingly threaten the lives and safety of hundreds of crew members and fare-paying passengers. Passengers are repeatedly exposed to potential physical harm during a skyjack not only from the hijacker, but also from security personnel who may use counterforce as a deterrent.[2] Consequently, the motto of air travel—"safety"—is placed in doubt, and there has been a serious setback in the air carrier image.[3]

—after he passed through and activated a preboard anti-hijack screening system). The penalty referred to for conviction of aircraft piracy is imprisonment for not less than twenty years or death, if affirmatively recommended by a jury verdict or if ordered in the court's discretion. *See* Federal Aviation Act of 1958, § 902(i)(1)(B), 49 U.S.C. § 1472(i)(1)(B) (1970). *But see* Furman v. Georgia, ___ U.S. ___, 92 S. Ct. 2726 (1972) (five to four decision), holding Georgia and Texas statutory "death penalty" provisions unconstitutional as cruel and unusual punishment under the Eighth and Fourteenth Amendments since they allowed the imposition of the death penalty for rape and murder *at the discretion of the judge or jury*. The Court found this resulted in the death penalty being discriminatorily applied to different defendants convicted of the same crime. Mr. Justice Douglas said: "The high service rendered by [the Eighth Amendment] is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups. . . . These discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishment." *Id.* at 2735.

[2] *See, e.g.*, The Spokesman-Review, Aug. 19, 1972, at 1, cols. 1-7. A middle-aged gunman who hijacked a United Air Lines jet and demanded $2-million was shot in the shoulder and leg by FBI agents posing as a relief crew.

Dr. David G. Hubbard, the Dallas psychiatrist and skyjacking expert who developed the "FAA behavioral profile," believes the use of counterforce is unwise. Dr. Hubbard thinks the use of counterforce may cause even greater tragedies. "These people look normal, but they're not," he says. "They're all crazy and they're all dangerous. Trying to control them by threats and force simply encourages them." There has been, in fact, a general escalation in the rate and types of skyjackings as the effort to fight back has been stepped up. "Soon," warns Dr. Hubbard, "we are going to have a 747 go down with 400 dead. We are going to have a catastrophe." LIFE, Aug. 11, 1972, at 27, 29.

[3] One reported: "It is horrible, when we were almost on the verge of total acceptance from the safety viewpoint, that this had to come up and add a new element of fear." Watkins, *Hijacking Impact Swells Airline Problems*, Av. Week & Space Technology, Sept. 21, 1970, at 28-29.

There are obvious criminal, and less obvious civil, ramifications to these incidents. The airlines and the government are taking steps to prevent the hijacker from getting on the plane, or at least from successfully completing the crime if once aboard. Some of these steps, such as the preboard "profile and electronic" screening, raise interesting constitutional issues. In addition, there are important legal questions with respect to the civil consequences of air piracy, *e.g.*, who, if anyone, is liable for personal injury to the passenger or for damage to his belongings? Rhetorically, is there an identifiable body of existing air law upon which to base a cause, or causes, of action; and if so, what are the tenable theories of recovery? Although the state of the law in this area is presently unsettled, the matter can be explored by apposite analogy and argument.

I. THE PHENOMENON IN CURRENT PERSPECTIVE

A. *The Act Legally Defined*

"Skyjacking" is variously referred to as "aircraft piracy" and "aircraft hijacking." While these terms have the same meaning, "skyjacking" seems to be gaining in popular usage. Some writers prefer the term "aircraft hijacking" since it connotes commandeering an aircraft by seizing control and diverting its course from the scheduled destination. This is distinct from "piracy," which implies robbery, pillage or depredations of the goods of another at sea for personal self-enrichment.[4] Sea piracy then is only really useful for historic analogy.

[4] Piracy, by customary rule of international law, is a universal crime. A pirate is an outlaw who loses the protection of his home state and his national character. Pirates attack and rob all nations indiscriminately; these practices make them the enemies of the human race and of the international community of states. Pirates place themselves completely outside the law of peaceful peoples. Persons and vessels engaged in piratical operations are entitled to the protection of no nation. Therefore, a pirate may be brought to summary justice anywhere, by anyone, as an enemy of every state. There is universal tacit consent to the suppression of piracy by all states by whatever means possible. *See* BLACK'S LAW DICTIONARY 1306 (4th ed. 1968); 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 681 (1941).

A comprehensive treatment of piracy is found in the Research in International Law Under the Auspices of the Harvard Law School, prepared in 1926 for use by the First Conference on the Codification of International Law convened by the League of Nations. *See* Articles of Convention, *Piracy*, 26 AM. J. INT'L L. 743 (Supp. 1932).

The 1958 Geneva Convention on the High Seas, article 15(1)(a) defines piracy: "Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a pri-

The penalties for piracy at sea have long been established and well enforced, *i.e.*, the pirate commits a crime against the law of nations, and accordingly, is a common criminal subject to summary punishment by the first authority that catches him. Although rustlers in the wild west shared a similar fate on the hanging tree, the same degree of legal certainty does not exist for piracy in the air for two basic reasons. First, the crime of piracy in the air is technically hijacking and not piracy. Second, the object of the crime, a jet airliner, is unique. Thus, the legal status of air piracy is clouded. It is uncertain whether the perpetrators are always guilty of a crime or if their deed will be punished.

There is no particular international law proscribing skyjacking as a "crime" to parallel the customary laws regarding piracy at sea.[5] Concrete international convention and domestic municipal law, however, is developing. It is this law that forms the foundation for the legal meaning of skyjacking. Presently, the crime of aircraft hijacking is exclusively statutory, code or convention law. For example:

By statute, the crime of air piracy in the United States is specifically defined to mean: Any unlawful seizure or exercise of control of an aircraft in flight in air commerce by force, violence or threat.[6] Congress expressly rejected the proposal to apply the concept of piracy on the high seas. Instead, the crime was limited to the statutory definition even though the lawmakers admittedly meant to proscribe an offense against the law of nations.[7]

The Argentine Penal Code defines aircraft hijacking to be: Any act of depredation or violence against an aircraft in flight, or on the ground maneuvering prior to take-off, or against persons or property within the aircraft. The crime includes any acts of viol-

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vate aircraft, and directed on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft." Convention on the High Seas, Sept. 30, 1962, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200. *But see* Wurfel, *Aircraft Piracy—Crime Or Fun?*, 10 WM. & MARY L. REV. 820, 840 (1969) for a criticism as to the general inapplicability of this treaty to the contemporary problem of air piracy or hijacking. The article also discusses United States statutory and case law on sea piracy.

[5] Ruppenthal, *World Law And The Hijacker*, NATION, Feb. 3, 1969, at 145. *See also* Lawrence, *Aerial Piracy—An International Crime*, U.S. NEWS & WORLD REPORT, Sept. 21, 1970, at 116.

[6] Federal Aviation Act of 1958, § 902(i), 49 U.S.C. § 1472(i) (1970).

[7] 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess. at 2567 (1961).

ence, threat of violence or fraud in usurping the command of the aircraft with the intent to seize it and take possession of its persons and property.[8]

The Australian Aircraft Crimes Act of 1963 defines an aircraft hijacker to mean: Any person who without lawful excuse takes or exercises control on board the aircraft, whether directly or through another person. The act can be done by force, violence, threat, trick or false pretense.[9]

The Mexican Penal Code proscribes the crime of air piracy and defines it to mean: Anyone who makes an aircraft change its destination through threats, violence, intimidation or by any other unlawful means, or makes it deviate from its route.[10]

The 1963 Tokyo Convention On Offenses And Certain Other Acts Committed On Board Aircraft defines unlawful seizure of aircraft as: Any act of interference, seizure or other wrongful exercise of control of an aircraft in flight, by force or threat of force.[11]

The 1970 ICAO Draft Convention On The Unlawful Seizure Of Aircraft defines an "offense" (without further label) to mean: Any unlawful seizure or exercise of control of an aircraft by force, threat or any other form of intimidation. The offense includes an attempted offense and covers any person on board an aircraft in flight, or that person's accomplice.[12]

The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft uses the expression "unlawful seizure of aircraft" without further definition. Article 1, however, does specify the acts constituting "the offense." The description of these acts is similar to the Tokyo Convention, so presumably the construction is identical.[13]

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[8] Reprinted at: *ICAO Draft Convention On The Unlawful Seizure Of Aircraft*, ICAO Doc. 8877-LC/161, at 108 (1970).

[9] *Id.* at 110.

[10] *Id.* at 117.

[11] Convention On Offenses And Certain Other Acts Committed On Board Aircraft (Tokyo Convention), June 30, 1969 [1969] 20 U.S.T. 2941, T.I.A.S. No. 6768, at 7-8.

[12] International Civil Aviation Organization, *Legal Committee, Seventeenth Session (Feb. 9 - Mar. 11, 1970): "Minutes And Documents Relating To The Subject Of Unlawful Seizure Of Aircraft—Draft Convention,"* ICAO Doc. 8877-LC/161, at 12.

[13] Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, ICAO Doc. 8920 at 1. Other articles provide that a state must prosecute the accused hijacker under its own laws if that state elects

For purposes of this discussion, it would be useful to extrapolate a composite definition for skyjacking. Hence, the crime of skyjacking is committed when a person, or his accomplice, seizes, exercises or usurps control of an aircraft in flight from its lawful pilots and crew, whether by trick, fraud, violence, force or intimidation, intending to divert or change its course and direction contrary to its scheduled operations. Although this combination is necessarily contrived, the definition of skyjacking is placed within four corners.

B. *Present Skyjacking Count*

1. *Worldwide*

The technology of rapid commercial jet travel between countries and the cold war politics of division that separates peoples and nations along ideological-nationalistic lines provide the ingredients for a successful skyjacking of an aircraft. A jet airliner, whether on the ground loaded with crew and passengers or in the air at an altitude of 30,000 feet, is highly vulnerable. Hijackings rarely occur intrastate mainly because the expectation of capture and prosecution is certain. Consequently, skyjackers generally seek to divert flights to nations of safe haven; *i.e.*, a state politically at odds with the state of the aircraft's registry.[14]

There are current international efforts to proscribe the crime of air piracy and to reinforce that law with effective means of prosecution.[15] The probabilities of arriving at workable agreements are good because of the recent proliferation of those acts of violence involving the airlines of other nations. Of course, the development of international law must necessarily interface with the criminal law already in force in this country.[16]

Yet, despite these steps, there have been increased attacks on international and domestic civil aviation. Persons armed with

not to extradite. *See generally* Mankiewicz, *The 1970 Hague Convention*, 37 J. AIR L. & COM. 195, 199 (1971).

[14] *See* statement of John J. O'Donnell, President, Airline Pilots Association, in U.S. News & World Report, July 3, 1972, at 13. Until the United States and other governments unite to impose severe penalties, air pirates are going to be tempted to hit again and again. *Id.* at 11.

[15] For the international aspects of skyjacking, *see* Symposium, *New Developments in the Law of International Aviation: The Control of Aerial Hijacking*, 65 AM. J. INT'L L. 71 (1971); Symposium, *The Unlawful Seizure of Aircraft: Approaches to the Legal Problems*, 37 J. AIR L. & COM. 163-234 (1971); Thesis, at 114-35.

[16] *See* text at n.107.

knives, guns and explosives have skyjacked as many aircraft to carry out their own personal and political vendettas in the first eight months of 1972 as were skyjacked during the entire year of 1971.[17] From 1948 to August 1, 1972, there were 247 skyjackings involving the registry aircraft of forty-three different nations.[18]

The statistics since 1970 also show lone men committed fifty-six per cent of the skyjackings; twenty-five per cent of the skyjackings were committed by two or more men as a team, while groups of men and women (including some families) were involved in sixteen per cent.[19] More importantly, coercion was used in every skyjack: sixty-four per cent with a pistol, rifle or automatic weapon; twenty-five per cent with explosive materials such as bombs, grenades or gasoline; and seven per cent with cutlery such as a knife or razor.[20] Thus, one-quarter of skyjackers used explosives, which if triggered, would undoubtedly have been fatal to all persons on board. Guns and knives even though lethal are more individual than group oriented. Significantly, the effective and real coercion is always against the passengers. This is why skyjacks are successful.

2. *United States*

On a cumulative basis, forty-two per cent of all skyjackings have occurred to aircraft of this country.[21] The principal reasons are twofold: the open nature of political activity in this country, which means increased vulnerability; and the American supremacy in the airline passenger industry. Thus, the registered aircraft of the United States are frequent targets. Of the twenty-one domestic air carriers that have been victimized, National Airlines has been the hardest hit at sixteen per cent; Trans World Airlines is second at twelve per cent; then Eastern Airlines at ten per cent. Delta Airlines and Pan American Airlines share a figure of seven per cent. The remaining fourteen air carriers, after United Air Lines at six per cent and Northwest Airlines at four per cent, are fairly even

[17] U.S. NEWS & WORLD REPORT, July 3, 1972, at 11; LIFE, August 11, 1972, at 26. Although hijacking attempts are up thirty-three per cent, the success rate has dropped—from eighty-five per cent in 1969 to thirty-seven per cent thus far this year.

[18] *See* APPENDIX *infra*, Tables I & II(A).

[19] *Id.* at Table III(A).

[20] *Id.* at Table III(B).

[21] *Id.* at Tables I & II(A).

with one or two hijackings apiece.[22] The statistics, of course, are constantly changing.

Skyjacking for the United States began on May 1, 1961, when an armed Cuban exile named Elphi Crosisi entered the cockpit of a National Airlines plane on a flight from Marathon to Key West, Florida, and forced the pilot to fly to Cuba.[23] Skyjackings today, however, involve a far more dangerous element than the homesick Cuban. For example, extortions—especially since the infamous D. B. Cooper incident[24]—have become fashionable.[25] Nevertheless, airline officials are worried more about the occasional, yet deadly, bomb threats[26] and the drastic counterforce used by the FBI,[27] than they are about extortion demands since this potential for violence directly jeopardizes many lives.

C. *Increasing Peril for Passengers*

Until recently, passengers have escaped personal injury and loss of life or property because the violence occurred to the pilots and crew members or to the aircraft itself.[28] Yet the probability for pas-

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[22] *Id.* at Table IV. The air carriers on east coast routes and those that terminate in Florida bear the onus because of their close proximity to Cuba.

[23] N.Y. Times, May 2, 1961, at 1, col. 6. Crosisi reportedly considered himself to be the reincarnation of a Spanish Main pirate by the name of Cofrisi.

[24] *See* N.Y. Times, Jan. 29, 1972, at 28, col. 5. Four out of the first five hijack attempts in 1972 involved persons who, noting apparent success of D. B. Cooper in parachuting from aircraft after receiving $200,000 in ransom, have tried to duplicate that act in one fashion or another. *See also* NEWSWEEK, Jan. 31, 1972, at 54.

[25] AV. WEEK & SPACE TECHNOLOGY, Jan. 3, 1972, at 15. *See, e.g.*, N.Y. Times, July 13, 1972, at 1, col. 3 (more than $1 million asked in hijacking of two jets); N.Y. Times, Aug. 1, 1972, at 1, col. 5 (three hijack jet for $1 million and order craft to Algeria).

[26] A live bomb was discovered on a TWA flight on March 7, 1972 following a call demanding $2 million in exchange for information as to the bombs whereabouts. Later the same evening a bomb did explode aboard a TWA 707 jetliner parked at the Las Vegas Airport completely destroying its flight deck. In addition, another bomb was discovered aboard a United Airlines jet in Seattle. U.S. NEWS & WORLD REPORT, Mar. 20, 1972, at 22.

[27] A good example was the July 31 hijack of a Delta DC-8 over Florida by a group of five adults and three children. At the time the record $1 million ransom was being handed over, FBI agents were ready to begin shooting until Delta officials insisted they stay clear. The plane flew off unscathed to Algeria. *See* LIFE, Aug. 11, 1972, at 26-27; N.Y. Times, Aug. 1, 1972, at 1, col. 4.

[28] In 1970-71, thirty-six persons were killed or wounded in the course of attempted skyjackings. Sixty million dollars worth of property damage was suffered in 1970 alone due to the destruction of aircraft. The economic losses caused by diversion of aircraft and crews from commercial service was also considerable.

sengers harm is great considering the ingredients: an emotionally unstable or criminally hardened skyjacker; lethal weapons, such as guns and explosives; and the inherent vulnerability of passengers and aircraft.

1. *The Threat From The Skyjacker*

The United States hijacking experience has produced two authoritative studies on the social and psychological composition of skyjackers.[29] These studies reveal several types of hijackers: the "homesick" Cuban; mentally disturbed persons including misfits, psychopaths and the lunatic fringe; criminals and fugitives from justice; and, lastly, political extremists and fanatics who hijack planes for blackmail or terror.[30] A composite profile of hijacker mentality reveals that they are all mentally unstable, suicidal and belligerent losers at everything they attempt and are between sixteen and thirty-five years of age. In addition, they all have a general pattern of "inadequacy" in their education, jobs and personal lives. Most of them share dreams and fantasies of being able to fly. Moreover, almost all hijackers are making fantasy escapes; they are running from something. They see themselves entering Utopia as heroes and contemplate dying a heroic death. Many hijackers call hijacking a "tremendous thrill." They take over large aircraft and for a moment control the destiny of many people. Most of all, the hijacker wants attention. It is a moment of power and glory they expect to sustain once they reach their destination.

Rein, *A Government Perspective* [Hijacking Symposium], 37 J. AIR L. & COM. 183-93 (1971).

[29] Dr. John Dailey, the chief of the Federal Aviation Administration's psychology staff, did a six-month study of skyjackers. The FAA has kept most of the study secret for security reasons. LIFE, April 18, 1969, at 220.

Dr. David Hubbard, a Dallas psychiatrist, has served as consultant both to the federal prison system and to the FAA and served as director of the Aberrant Behavior Center. He has interviewed and studied forty-eight skyjackers. LIFE, Aug. 11, 1972, at 26; NEWSWEEK, Aug. 24, 1970, at 69. *See generally*, D. HUBBARD, THE SKYJACKER: HIS FLIGHTS OF FANCY (1971). A special characteristic noted by Dr. Hubbard is a streak of irrationality that often shows itself in a mixture of sophisticated planning and naive action.

[30] *See, e.g.*, note 2 *supra*. In several statements read over local radio stations, the hijacker said he was part of a "well-organized paramilitary organization fed up with Nixon's broken promises. . . ." Authorities quoted him as saying the hijack "is part of an organized effort to destroy United Air Lines aircraft until the Vietnam war is ended." The hijacker, before being shot by FBI agents, had demanded: $2 million in $20 and $50 bills, fifteen one-pound gold bars, two Magnum pistols and three submachine guns, clothing, flashlights, food, medicine and handcuffs.

Every skyjack represents a threat to the lives of all on board the aircraft. An increase in the number of desperate and irrational acts taken by frustrated hijackers has seemingly followed every effort to intensify anti-hijack measures: more passengers are becoming victims, either intentionally[31] or unintentionally.[32] For example, twenty-four passengers were killed and seventy-eight wounded inside Tel Aviv's Lod International Airport in one of the most callous of the Mid-East terrorist acts.[33] Unhappily, a tragic trend is developing—passengers are being singled out as targets of skyjacker violence.

2. *The Threat From The Counterforce*

The first passenger to be killed during a skyjacking attempt in the United States was Howard L. Franks on June 11, 1971.[34] He was caught in the onboard cross-fire between the hijacker and an armed co-pilot and sky-marshal. A similar tragedy occurred on July 5, 1972; E. H. Stanley Carter was fatally wounded in an exchange of gunfire between two hijackers and FBI agents aboard a Pacific Southwest airliner at San Francisco International Airport.[35] In each instance, both victims reportedly were killed by the skyjackers.

It is becoming clear that government security agencies responsible for United States anti-hijack measures are adopting a hard line toward skyjackers—a "get tough" policy modeled after the countermeasures used by Israel.[36] The consequence undoubtedly will be

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[31] *See, e.g.*, N.Y. Times, July 25, 1971, at 25, col. 1. A stewardess and passenger were shot during the hijacking to Havana of a National Airlines DC-8.

[32] On February 21, 1970, an explosion occurred aboard a Swiss airliner bound for Israel shortly after takeoff from Zurich. All thirty-eight passengers and nine crew members were killed. N.Y. Times, Feb. 25, 1970, at 1, col. 2. Palestine Arabs were widely thought to be responsible. Not long after this tragedy, Arab guerrillas hijacked four jets and held 300 men, women and children hostage and under threat of death in the Jordanian desert. All the planes (worth $50 million), including a Pan Am 747, were blown-up. Fortunately, a negotiated release was obtained for the passengers. *See* AV. WEEK & SPACE TECHNOLOGY, Sept. 14, 1970, at 33-38; LIFE, Sept. 18, 1970, at 30-37; U.S. NEWS & WORLD REPORT, Sept. 21, 1970, at 20-21.

[33] TIME, June 12, 1972, at 23-25; NEWSWEEK, June 12, 1972, at 57-58.

[34] N.Y. Times, June 13, 1971, at 1, col. 5. Franks demanded to be flown to North Vietnam but was shot and seized by FBI agents and police while aboard a TWA Boeing 727 on the ground at Kennedy International Airport.

[35] N.Y. Times, July 6, 1972, at 1, col. 5. The two skyjackers, who had held eighty-six passengers hostage while they waited for $800,000 in ransom, were also killed. Two other passengers were wounded in the gun battle.

[36] *See, e.g.*, TIME, May 22, 1972, at 29 (a good example of the anti-hijack tactics

more passenger injuries and even deaths. This emergent fact may result in new litigation aimed at expanding the liability of the airlines, and particularly that of the government, to compensate skyjack victims.

II. Civil Liability for Passenger Injury or Death

An estimated nine to ten thousand passengers have been aboard skyjacked United States registered aircraft.[37] The exact number of injuries and deaths resulting from these incidents is not known, but it is believed to be low. This probably explains the limited number of suits that have been filed. Recent events, however, may signal a change.

A passenger on a skyjacked flight conceivably could suffer several kinds of compensable damage for which the skyjacker, the airline and even arguably the government would be jointly or severally liable[38]; *e.g.*, death; physical injury; mental anguish or mental disorder inflicted by the trauma of the skyjack experience;[39] loss or damage to personal property; delay or substitute travel expenses incurred in being unable to make an interconnecting flight

used by Israel). The same "get tough" policy seems now to have been adopted by government security agencies in this country. LIFE, Aug. 11, 1972, at 26-27, 30. In May, FAA Administrator John Shaffer reportedly told pilots, "there's been a change in attitudes . . . a new and harsher attitude we're all taking toward these incidents." Authorities have said the use of force would no longer be off limits. The FBI, for example, no longer forbids agents to storm passenger-filled planes. Screening and other pre-board measures are not enough, reported FAA security chief Murphy.

Airline officials traditionally have opposed the use of force on board aircraft; the risks involved in an aerial gun battle appeared too great to take. The policy was one of absolute and complete submissiveness. *See* Wurfel, *Aircraft Piracy—Crime Or Fun?*, 10 WM. & MARY L. REV. 820, 863-65 (1969); Woolsey, *Prevention Of Hijacking Switches From Passive To Active Measures*, AV. WEEK & SPACE TECHNOLOGY, Sept. 21, 1970, at 29. Standing instructions of a major airline to all its flight officers: "In the event of an armed threat to any crew member, comply with the demands presented. The most important consideration under the act of aircraft piracy is the safety of the lives of the passengers and crew. Any other factor is secondary." *Id.* (excerpt from Eastern Airlines Flight Brief).

[37] One hundred skyjackings times an estimated average passenger count of ninety to 100 per plane. *See* APPENDIX *infra*, Tables II(A) & IV.

[38] *See generally* Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFFALO L. REV. 339-59 (1972) [hereinafter cited *Compensation for Passengers*]; Comment, *Aircraft Hijacking: Criminal and Civil Aspects*, 22 U. FLA. L. REV. 72-100 (1969) [hereinafter cited *Aircraft Hijacking*].

[39] *See Compensation for Passengers* at 347-49. Abramovsky gives special attention to case law bearing on recovery for negligently inflicted mental distress.

or other travel connections; or even loss to business of a valuable contract bid or client because of the delay. These are just a few of the possibilities. The general law of air carrier and government liability provides the only reference for analogy to the skyjack situation. The rules with respect to the duty of care owed the passenger are sufficiently well-developed to form a basis for discussion.

A. *Civil Suit Against the Skyjacker*

The skyjacker is the most obvious defendant for civil suit in the event a passenger is injured or killed. But he is also the least likely to be able to respond in money damages. Indeed, most skyjackers are judgment proof.[40] In addition, many skyjackings succeed and the culprit escapes; rarely are they extradited. Moreover, those hijackers who are arrested face criminal prosecution and prison sentences.[41] Consequently, the skyjacker, for all practical purposes, is eliminated from the list of civil defendants.

B. *Civil Suit Against the Air Carrier*

Every skyjack creates the potential of liability for the carrier. The law places a high duty of care upon an airline for the safe carriage of its passengers,[42] including the protection against assaults by third persons.[43] Death or injury to a passenger aboard a commandeered flight could result in a successful civil suit against the air carrier.[44]

1. *Breach of Statutory and Regulatory Duties of Care*

Section 104 of the Federal Aviation Act of 1958 declares every citizen's right of public transit through the navigable airspace of

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[40] *See Aircraft Hijacking*, at 90.

[41] N.Y. Times, July 24, 1971, at 16, col. 2. This article contains a statistical summary showing the subsequent disposition of criminal charges that have been filed against persons accused of air piracy involving United States registered aircraft.

[42] *See* note 59 *infra.*

[43] *See* note 64 *infra.*

[44] "It is not suggested that the airlines should be the insurers of their passengers' safety, but it is contended that . . . the burden of proof, where serious injury is suffered by a passenger, should be placed on the airline to show that it has done everything possible to avert the attacks, regardless of whether or not one of its own planes was hijacked in the recent past. *The airline is in a position to prevent the hijacker from accomplishing his criminal act, while the passenger is in no way capable of doing so.*" *Compensation for Passengers* at 345, 347 (emphasis added).

the United States.[45] Section 404(a) of the Act imposes an additional duty on every air carrier to provide safe and adequate service, equipment and facilities in connection with interstate and overseas air transportation.[46] Since United States citizens have a right to freedom of air transit and air carriers have a reciprocal duty to provide safe and adequate service to the passenger, section 1111 of the Act gives the airlines the authority to refuse transportation when, in the sole judgment of the air carrier, a certain passenger might be inimical to the safety of the flight.[47] This refusal power, of course, statutorily balances the section 104 public right of freedom of air transit. Since sections 104 and 1111 are complementary with respect to air transit safety, they impose a high degree of care and even selectivity on the part of the air carrier to ensure the safety of passengers who board the plane.

Of even greater importance are the recently promulgated Federal Aviation Administration regulations specifically dealing with preboard security measures to be taken by the airlines.[48] These new rules require airlines to install and operate an "approved" FAA screening system to prevent skyjackers from bringing weapons or explosives aboard on their person or in carry-on baggage. Section (h) of the regulations provides that "each certificate holder *shall at all times* maintain and carry out the [approved] screening system . . . and security program. . . ."[49] This language is mandatory. Other

[45] Federal Aviation Act of 1958, § 104, 49 U.S.C. § 1304 (1970).

[46] Federal Aviation Act of 1958, § 404(a), 49 U.S.C. § 1374(a) (1970).

[47] Federal Aviation Act of 1958, § 1111, 49 U.S.C. § 1511 (1970). *See also* Wolfer v. Northeast Airlines, Inc., 12 Avi. 17,186 (Fla. Sm. Cl. Ct. 1971), holding an air carrier acted reasonably in refusing to permit passenger to board a flight after the passenger stated in jest: "I don't need any bags to hijack the plane." Passenger's suit for damages failed. Judge Rainwater said: "[A]ircraft hijackings, including express or implied threats . . . , pose a serious problem to the public in general and to the air carrier in particular, and their passengers. . . . There is no such thing as a joke on the subject . . . . Such jokes are the equivalent of shouting 'fire' in a crowded auditorium, and may reasonably be interpreted as presenting a clear and present threat to safety of flight. In any case, the comic must accept the reasonable consequences flowing from the exercise of such abysmal judgment." *Id.* at 17,187. The court did not rely on section 1511 of the Act.

[48] F.A.R. § 121.538 (Aircraft Security), 37 FED. REG. 2500, *as amended by* 37 FED. REG. 4904, 5254, 7150 (1972) [hereinafter cited Security Rules]. Once printed in the FEDERAL REGISTER, an F.A.R. has the force of statutory law. *See also* N.Y. Times, Feb. 1, 1972, at 1, col. 2 & Feb. 6, 1972, pt. IV, at 4, col. 4.

[49] F.A.R. § 121.538, 37 FED. REG. 2500, *as amended by* 37 FED. REG. 4904, 5254, 7150 (1972). Section (c) requires the airlines to submit in writing their

sections require the pilot to conduct a preflight security inspection whenever the carrier receives a bomb or air piracy threat against a particular flight and a postflight check if the threat is received while the plane is airborne.[50] The security plan submitted by the air carrier must also provide for proper baggage inspection by airline personnel in addition to measures to prevent unauthorized access to aircraft.[51]

Importantly, since these new regulations place the burden on air carriers to implement a preboard screening program designed to prevent skyjackings, failure to act, or failure to act in accordance with the regulations, would be a violation of federal statutory law expressly established for the protection of the flying public. Thus, a violation would be sufficient to establish negligence per se if the death or injury to the passenger is the proximate cause of a subsequent skyjack.[52] The FAA recently fined two air carriers for violating these regulations by not taking proper on-ground security measures to prevent two skyjackings.[53]

2. *Breach of Common Law Duty of Care*

The most reliable and well-developed theory of recovery lies in tort for negligence.[54] Aviation law is replete with cases delineating the duty of care airlines owe the passenger and the resulting liability for breach of that duty. The cases also develop the possible defenses to a negligence action.[55]

Skyjackings primarily occur aboard those air carriers that are common carriers,[56] especially the big scheduled airlines.[57] The duty

proposed security program for FAA approval. The FAA, under section (g), retains authority to unilaterally amend the program should changing circumstances warrant and require even stiffer antihijack measures.

[50] *Id.* at § (i).

[51] *Id.* at § (c)(1)&(2).

[52] An airline obviously would have breached the duty to exercise the highest degree of care and foresight for its passengers. *See* note 59 *infra*; *Compensation for Passengers* at 345.

[53] N.Y. Times, Apr. 12, 1972, at 1, col. 2.

[54] General negligence law applies to airplane tort cases. *See, e.g.*, United States v. Schultetus, 277 F.2d 322, 325 (5th Cir. 1960).

[55] *See also* Thesis 71-79 for a discussion of several possible defenses.

[56] A common carrier holds its services out for hire to the general public. It agrees to carry at a uniform rate, without distinction or difference, all persons who apply, so long as there is space. *See, e.g.*, Gerard v. American Airlines, Inc., 272 F.2d 35 (2d Cir. 1959); Jackson v. Stancil, 253 N.C. 252, 116 S.E.2d 817 (1960).

[57] A private carrier, such as an air taxi operator, does not offer its services to

of common carrier airlines to their fare-paying passengers is controlled by state law as modified by standards imposed by federal legislation and administrative orders.[58] A majority of state courts hold that common carrier airlines owe passengers the highest degree of care for their safety that is consistent with the operation and conduct of the airline's business. The high risks of air travel dictate this standard. This degree of care has also been variously described as the care of "an unusually prudent and competent carrier," "as far as human care and foresight can provide" and "utmost care."[59] The law, however, does not require air carriers to exercise all the care, skill and diligence that the human mind could conceive or that would remove all peril from the transportation. A common carrier by air is only under a duty to protect against those casualties that can be reasonably foreseen.[60] The air carrier is not an insurer of the passenger's safety; liability for injury or death must be founded upon some act of negligence or fault.[61]

Admittedly, skyjackings are more than a reasonably foreseeable risk of air travel.[62] The contemporary problem of hijacking and its

the general public, but to special clientele. The private carrier reserves the right to refuse carriage to anyone, even though there might be space. *See, e.g.*, Sleezer v. Lang, 170 Neb. 239, 102 N.W.2d 435 (1960). Significantly, a private or contract carrier owes its passengers only the duty of "ordinary care."

[58] Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590, 597 (1954).

[59] *See* Arrow Aviation, Inc. v. Moore, 266 F.2d 488 (8th Cir. 1959); Wilson v. Capital Airlines, 240 F.2d 492 (4th Cir. 1957); Lunsford v. Tucson Aivation Corp., 73 Ariz. 277, 240 P.2d 545 (1952); Roberts v. Trans World Airlines, 225 Cal. App. 2d 344, 37 Cal. Rptr. 291 (Dist. Ct. 1964).

A well-known maxim the law applies is: The greater the danger the greater the care required. Ziser v. Colonial Western Airways, Inc., 10 N.J. M1118, 162 A. 591 (N.J. 1932).

See also Compensation for Passengers at 343-44, nn.25-29, for a listing of similar duties of care owed to passengers by common carriers other than airlines.

[60] Wilson v. Capital Airlines, 240 F.2d 492 (4th Cir. 1957). The air carrier was found not liable for an injury in the plane's lavatory to a large elderly female; the woman had a tumor in the bones around her hip joint which was susceptible to pathological fracture. The court said: The common carrier is not an insurer, therefore the mere fact of injury is not sufficient to raise a presumption of negligence. The carrier is not liable for extraordinary situations not reasonably foreseeable. The possibility of danger must be ordinary and apparent to the carrier for it to be reasonably foreseeable.

[61] *See* Noel v. United Aircraft Corp., 204 F. Supp. 929 (D. Del. 1962); Ness v. West Coast Airlines, 90 Ida. 111, 410 P.2d 965 (1964); Griffith v. United Airlines, 416 Pa. 1, 203 A.2d 796 (1964). *See generally* 1 L. KREINDLER, AVIATION ACCIDENT LAW § 3.07 (1963).

[62] *See Compensation for Passengers* at 347.

inherent dangers and risks are ordinary and apparent to everyone. The notoriety and publicity given the matter is unquestioned. Airlines and the government have even undertaken a joint anti-hijack program aimed at stopping the skyjacker. All of these factors are capable of judicial notice.

Regardless of the skyjacking threat, the air carrier must still act with *highest* care having in mind the safety of its passengers; any breach of this duty is negligence. Airlines, therefore, are presumably liable to the victims of a skyjack in the event of a breach.[63] The courts very well could move toward a position of imposing absolute liability on air carriers to compensate passengers.[64] This would

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[63] *See, e.g.*, Ness v. West Coast Airlines, 90 Ida. 111, 410 P.2d 965 (1965). The airline was held liable for injuries to passengers thrown out of their seats when the plane encountered air turbulence. The "Fasten Seat Belt" sign was turned-off. In this case, there was sufficient proof of negligence since various factors that usually contribute to air turbulence were known to the pilot; *i.e.* low pressure area, cold front advancing along course of flight, and terrain features such as deep canyons and high mountains.

A skyjack petition or complaint against the air carrier might allege any or all of the following as negligence:

(i) Failure to use the FAA hijacker behavioral profile or the magnetometer in accordance with FAA regulations.

(ii) Failure to inspect carry-on or stow-away baggage.

(iii) Failure to provide skymarshal or airline security guards aboard the aircraft.

(iv) Failure to provide cockpit cabin door locks openable only from the inside.

(v) Failure to resist the skyjacker (passively acquiescing to his demands).

(vi) Failure to timely and effectively subdue the skyjacker when the opportunity presents itself.

(vii) Failure to resist or subdue the skyjacker at a time and place which offers the minimum danger to the passengers.

[64] *See, e.g.*, Miller v. Mills, 257 S.W.2d 520 (Ky. Ct. App. 1953). This case involved an altercation between a bus driver and two intoxicated passengers. An innocent passenger was injured by a thrown whiskey bottle. The court found the bus driver was negligent: he might have reasonably anticipated that objects would be thrown or even firearms discharged. The driver breached the duty to exercise the highest degree of care practicable to protect and guard passengers from violence and assault.

Presumably airlines will be held liable for like conduct on the part of airline personnel in a skyjack situation. *See Compensation for Passengers* at 344, nn.30-37, for development of a line of cases imposing a special duty upon the common carrier to protect passengers from the wrongful acts of third persons. The implication of these cases, coupled with the highest duty of care already owed to passengers for their safety and with the undeniable foreseeability of skyjacking, could mean airlines are under an implied obligation to provide a police force—or at least employ strict security measures—to protect passengers from skyjacker violence.

place the financial burden of skyjackings on those best able to guard against the risk—the airlines.[65]

3. *International Ticketed Flights: Absolute Liability*

The 1966 Montreal Agreement,[66] which amended (and is to be read in context with) the 1929 Warsaw Convention,[67] makes a United States registered air carrier absolutely liable up to 75,000 dollars of provable damages[68] for the death, wounding or other bodily injury[69] to any ticketed passenger whose point of departure, landing or agreed stopover is international in character.[70] In addition, the Montreal Agreement waived the Warsaw article 20(1) defense of due care.[71] Hence, one can recover for all compensable damages on the principle of absolute, no-fault liability up to 75,000 dollars. Even this ceiling limitation may be surpassed if the plaintiff can prove "willful misconduct" on the part of the air carrier under the Warsaw Convention.[72]

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[65] *See* note 44 *supra*. A special ticket tax to fund a "no-fault" reserve could provide a ready source of compensation for the skyjack victim.

[66] Special Meeting on Limits for Passengers Under the Warsaw Convention and Hague Protocol [Montreal, Canada], Feb. 1-15, 1966, ICAO Doc. 8584-LC/154-1&2, CAB Order No. E-23680, 31 Fed. Reg. 7302 (eff. May 13, 1966). *See* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 563-601 (1967).

See also Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air [Guatemala City, Guatemala], Mar. 8, 1971, ICAO Doc. 8932. The Guatemala Protocol, which is now open for signature, would further amend Warsaw in several important respects; *e.g.* raise the absolute liability ceiling to $100,000, and after a period of ten years to $125,000; provide the carrier with a contributory negligence defense that would operate to wholly or partially exonerate the carrier from liability on the principle of comparative negligence; allow for the awarding of reasonable attorney's fees at the discretion of the trial court; and provide a more restrictive standard for defining 'willful misconduct.' *See* discussion at: *Compensation for Passengers* at 356-58; 64 DEP'T STATE BULL. 555 (1971); 65 AM. J. INT'L L. 670 (1971); Mankiewicz, *The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention*, 38 J. AIR L. & COM. 519 (1972).

[67] Convention for the Unification of Certain Rules Relating to International Transportation by Air [Warsaw, Poland], Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934).

[68] Montreal, article 1(1).

[69] Warsaw, article 17.

[70] Warsaw, article 1(a).

[71] Montreal, article 1(2).

[72] There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct. "Willful misconduct" (gross negligence) has been variously defined as: (i) a deliberate act not to discharge some duty necessary to safety (ii) a conscious and willful omission

The Montreal Agreement offers the carrier a defense; plaintiff's cause of action has to be independently established, for example, under a state wrongful death statute[73] or the federal Death on the High Seas Act.[74] The carrier interposes the Montreal "ceiling" to limit its liability. Accordingly, plaintiffs typically seek a two-fold recovery: First, by asking for a summary judgment of 75,000 dollars under the Montreal Agreement; and second, by alleging "willful misconduct" under the Warsaw Convention to increase carrier liability.[75] The first recovery often helps finance the second action.

The combination of Warsaw-Montreal provides a means of ready compensation for the victim of a skyjack flying on an international ticket; the passenger would only have to show that he was aboard the skyjacked plane and then prove his damages up to 75,000 dollars. This is exactly what happened in *Herman v. Trans World Airlines, Inc.*[76] An infant passenger claimed damages because of mental anguish[77] allegedly suffered during a hijacking and seven days detention in the Jordan desert at the hands of Palestinian Arab guerrillas in September 1970.[78] The defendant air carrier argued that article 17 of the Warsaw Convention was inapposite for two reasons: (i) affliction of mental harm did not come within the meaning of personal injury from "death, wounding, or other bodily injury"; and (ii) the use of the plane as a detention camp by the hijackers occurred after the flight had ended. The New York Superior Court rejected both arguments.

The court found the English words "any other bodily injury" to have a broad meaning in light of the original French text. Several

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from a positive duty (iii) reckless disregard of the consequences. *See, e.g.*, K.L.M. v. Tuller, 292 F.2d 775 (D.C. Cir.), *cert. denied*, 368 U.S. 921 (1961); Grey v. American Airlines, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

Query whether a failure by an air carrier to take the anti-hijack measures and precautions now required by FAA regulation would rise to the level of "willful misconduct"?

[73] *See, e.g.*, CAL. CIV. PRO. CODE § 377 (West 1954).

[74] 46 U.S.C. §§ 761-67 (1970).

[75] *See* Interpretation: Dep't of State Memo, United States Government Action Concerning the Warsaw Convention 4 (1966), *reprinted in* L. KREINDLER, AVIATION ACCIDENT LAW 380 (Supp. 1970).

[76] 330 N.Y.S.2d 829 (N.Y. Sup. Ct. 1972).

[77] Plaintiff asserted she suffered extreme fright, loss of weight and developed a skin rash. *Id.* at 830.

[78] *See* note 32 *supra.*

concepts were held to be included in addition to physical injury; *e.g.*, "damage," "prejudice," "wrong" or "hurt."[79] In the opinion of the New York court, the translated phrase encompassed both mental and physical injuries. Moreover, mental injury was held to include "fright and distress." The court further found the conditions of Warsaw article 17 to have been satisfied since plaintiff's injuries were sustained "both while on board the aircraft during flight [when the hijacking commenced] and while physically still on board during the subsequent week of detention in the desert [while the hijacking was still in progress]."[80] The court recognized that plaintiff had been "held in close confinement by [the] armed hijackers" both while the plane was in flight and on the ground.[81] The act of skyjacking, therefore, was continuous in nature. Consequently, the court concluded that TWA's liability was absolute under Warsaw-Montreal; the only question was the amount of damages.

4. *Recovery for Damaged or Lost Baggage*

Almost every air carrier has filed tariffs with the Civil Aeronautics Board to limit its liability for loss or damage to passenger luggage.[82] Conditions contained in the tariff are binding on the passenger regardless of knowledge or assent since tariffs[83] approved by the CAB[84] become part of the contract of carriage between the airline and the passenger.[85] The tariff may even totally exempt the

[79] 330 N.Y.S.2d 829, 832 (N.Y. Sup. Ct. 1972). *See also Compensation for Passengers* at 353.

[80] *Id.* at 832-33.

[81] *Id.* at 833.

[82] Federal Aviation Act of 1958, § 403(a), 49 U.S.C. § 1373(a) (1970).

[83] Contracts for carriage shall conform to the approved and published tariffs filed with the Civil Aeronautics Board. *See* Federal Aviation Act of 1958, § 403(a), 49 U.S.C. § 1373(a) (1970).

[84] The "reasonableness" of tariffs, rules, regulations, and practices of air carriers are subject, in the first instance, to the primary jurisdiction of the Civil Aeronautics Board. Neither state or federal courts have jurisdiction over any matter within the ambit of the CAB's administrative and regulatory authority until a litigant has exhausted his remedies before that body. *See* Herman v. Northwest Airlines, Inc., 222 F.2d 326 (2d Cir.), *cert. denied*, 350 U.S. 843 (1955); Lichten v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951); Adler v. Chicago & So. Airlines, Inc., 41 F. Supp. 366 (E.D. Mo. 1941).

[85] *See, e.g.*, Mao v. Eastern Airlines, Inc., 310 F. Supp. 844 (D.C.N.Y. 1970); Martin v. Trans World Airlines, Inc., 219 Pa. 2d 42, 280 A.2d 647 (Super. Ct. 1971). The passenger, in the latter case, was held bound by the limitation of liability for baggage loss contained in the air carrier's tariff. Even though the

airline from liability.[86] The carrier is liable only to the amount declared in its tariff, even though negligent, unless the passenger declares a higher value and pays an additional charge.[87] Skyjack victims presumably are in no better position than any other passengers; they would be bound by filed tariff limitations regarding recovery for damaged or lost baggage.

C. *Civil Suit Against the Federal Government*

The federal government, primarily through the Federal Aviation Administration, is heavily committed in men, money and material to the implementation of the anti-hijack program. The government's activities are closely intertwined with those of the airlines. On the ground, FAA and airline security personnel closely cooperate in carrying out preboard screening procedures, which use the skyjacker behavioral profile that was researched and developed by the FAA in addition to the electronic weapons-detection equipment.[88] The FBI is even involved; its new "get tough" policy is designed to end skyjackings—by shooting and wounding or killing hijackers if necessary.[89] In short, the federal government has undertaken an extensive and multi-faceted program to stop skyjackings, all in the interest of aviation safety to protect the public, which travels as passengers.[90]

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passenger did not read the print on the ticket, the baggage check nor the large posted signs regarding the baggage liability limitation, he had constructive notice.

[86] Lichten v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951). The carrier's tariff disclaimed all liability for damage or loss of jewelry. This exculpatory clause was upheld and enforced.

[87] *See, e.g.*, S. Toepfer, Inc. v. Braniff Airways, Inc., 135 F. Supp. 671 (W.D. Okla. 1955). *See also* Conklin v. Canadian-Colonial Airways, Inc., 266 N.Y. 244, 194 N.E. 692 (1935). A tariff may limit liability for loss of baggage only if an option is given to pay a lower fare. This gives the passenger the voluntary choice of contracting for full or limited liability.

[88] *See* Security Rules.

[89] *See supra* notes 35-36 and accompanying text.

[90] *Actions to Deal With the Menace of Air Piracy: Statement by President Nixon (Sept. 11, 1970), reprinted at* 63 DEP'T STATE BULL. 341-43 (1970). This is probably the most definitive and authoritative statement on the commitment of the federal government to the anti-hijack program. It represents the official United States position on the matter; it also formulates the step by step evolvement by the executive branch of plans to deal with the problem of skyjacking.

See also U.S. NEWS & WORLD REPORT, July 3, 1972, at 11-13, for recent statements by leading officials regarding Government responsibility for the anti-hijack program. *See generally* Rein, *A Government Perspective* [*Hijacking Symposium*], 37 J. AIR L. & COM. 183, 184-92 (1971); Volpe & Stewart, Jr., *Aircraft*

Skyjacked passengers who suffer personal injury, death or even personal property damage may be able to sue the government successfully. The premise of recovery lies in analogy to the well-developed body of case law concerning government liability for the negligent operations of its air traffic controllers.[91] The same theory and general principles of law arguably are apposite to government operations in its anti-hijack program.

1. *Liability for "Operating" Negligence*

The federal government waived its historic sovereign immunity and gave its consent to be sued for the negligence of its employees in the Federal Tort Claims Act.[92] The FTCA, however, contains certain "exceptions,"[93] which in effect preserve sovereign immunity for certain government activities. A great deal of litigation has

Hijacking: Some Domestic and International Responses, 59 KY. L.J. 273, 275-89 (1970).

[91] The government's influence is felt in all phases of aviation; it certifies aircraft airworthiness, provides funds and establishes standards for airport development, and operates a multi-billion dollar air traffic control system. Almost every flight in the United States is controlled to some degree by the government's air traffic controllers. They provide instructions, weather information, advice and traffic guidance to pilots.

See generally, Comment, *Government Liability—Air Traffic Controllers—Duty of Care*, 33 J. AIR L. & COM. 185 (1967); Levy, *The Expanding Responsibility of the Government Air Traffic Controller*, 36 FORDHAM L. REV. 401 (1968); Noyer, *Judicial Trends Reflecting Government Responsibility in Aviation Accident Litigation*, [1968] A.B.A. SECT. INS. N.&C.L. 453 (1968).

[92] The Federal Tort Claims Act [hereinafter cited FTCA], 28 U.S.C. §§ 2671-680 (1970). *See generally* Kennelly, *Claims and Suits for Aviation Accidents Under the Federal Tort Claims Act*, TR. LAW. GUIDE 1 (1972).

See FTCA, 28 U.S.C. § 1346(b) (1970). This section gives district courts exclusive jurisdiction of civil actions or claims against the United States. The claim must arise out of the negligence of an employee of the federal government acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable.

See also FTCA, 28 U.S.C. § 2674 (1970). This section states that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances.

[93] FTCA, 28 U.S.C. § 2680(a), (h) (1970). This statute sets out the "exceptions" to the FTCA for which the government still is not liable to suit:

(a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

evolved around these FTCA "exceptions," which the government typically interposes as defenses in a tort action.[94] The most evident development in the case law is the erosion by the courts of these remaining immunities. Consequently, the government has been exposed to broader tort liability.[95]

The FTCA "discretionary function" exception has consistently been the principal government defense. The landmark decision of the Supreme Court in *Indian Towing Co., Inc. v. United States*[96] narrowed, and in many respects eliminated, its effectiveness. In that case, a ship ran aground and was heavily damaged because the Coast Guard failed to maintain adequately a warning signal in a lighthouse. The Court found the government liable for negligence under the FTCA and further held the failure of the Coast Guard to maintain a signal light was an "operational function," which did not fall within the "planning and decision making" exception of the discretionary function rule. An important postulate was therefore established: Once the government voluntarily and gratuitously undertakes an operation of any type, it must thereafter exercise due care in the execution of that operation. The decision concluded that daily operations and activities of government agencies were to be examined for negligence in the same manner as any private enterprise.[97]

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[94] The government, for example, has relied upon the defense of "execution of a regulation." The government maintained that once it promulgates an operations manual, and interprets it, a government employee following the manual should not be liable. The courts have rejected this position. The government could insulate itself from liability by simply testifying as to the interpretation of the manual regardless of the letter of the regulation. *See, e.g.*, Ingham v. United States, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); Weiner v. United States, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964).

[95] *See generally* Kennelly, *Claims and Suits for Aviation Accidents Under the Federal Tort Claims Act*, TR. LAW. GUIDE 1 (1972); Comment, *Government Liability—Air Traffic Controllers—Duty of Care*, 33 J. AIR L. & COM. 185 (1967).

[96] 350 U.S. 61 (1955). *See also* Rayonier Inc. v. United States, 352 U.S. 315 (1957).

[97] Fair v. United States, 234 F.2d 288 (5th Cir. 1956). This court enunciated the "Good Samaritan" doctrine: once it voluntarily undertakes to perform certain acts or functions on which others come to rely, the government then must perform them with due care. Therefore, the government is liable for the actions of its employees directly dealing with the public in the application of established policies.

2. *Air Traffic Control Case Law Precedent*

Eastern Airlines, Inc. v. Union Trust Co.[98] determined the extent of governmental liability in the aviation accident litigation field. A government Air Traffic Control (ATC) operator negligently cleared an Eastern DC-4 and a Bolivian military plane to land on the same runway at the same time. There was a mid-air collision fatal to all aboard the DC-4. The military pilot escaped with minor injuries. The government argued that the duties of control tower personnel were public in nature and involved the exercise of discretion and judgment. The District of Columbia Circuit rejected this argument and found the government liable. The court said that the decision to establish a control tower was within the discretionary function exception to the FTCA, but the subsequent negligent operation of the control tower was not discretionary since the type of judgment exercised was of an "operational" nature that did not involve policy judgments and decisions. In short, immune governmental discretion was exercised when the United States decided to build and operate the ATC tower. Tower personnel, however, had no discretion to operate it negligently. Thus, the law is clear: Once the government decides to undertake a project, due care must be exercised in its daily operational execution or liability results.[99]

There has been increasing judicial recognition that aviation safety requires the combined efforts of the airlines, via their pilots and crews, and the government, via its air traffic controllers. The courts consequently have subjected both airlines and the government to concurrent duties and responsibilities toward the passenger,[100] with the government air traffic controller having the

[98] 221 F.2d 62 (D.C. Cir. 1955), *aff'd mem. sub nom.*, United States v. Union Trust Co., 350 U.S. 907 (1956). The Supreme Court, in affirming the judgment, cited the *Indian Towing* case. *See also* American Airlines v. United States, 418 F.2d 180, 192 (5th Cir. 1969).

[99] This proposition is firmly established. *See, e.g.*, Spaulding v. United States, 455 F.2d 222, 226 (9th Cir. 1972). The court, in citing the *Indian Towing* case, said: " . . . The air traffic controller is required to give all information and warnings specified in his manuals, and in certain situations he must give warnings beyond the manuals. *This duty is based on the simple tort principle that once the Government has assumed a function or service, it is liable for negligent performance.*" (emphasis added). The text and footnotes in *Spaulding* contain a good discussion of the leading air law cases dealing with government air traffic control liability.

[100] "[T]he standard of due care is concurrent, resting upon both the airplane pilot and ground aviation personnel. Both are responsible for the safe conduct of the aircraft . . . both are responsible for the safety of airplane passengers." *Id.*

greater burden.[101] Weather information is a good example of this expanded scope of duty and liability. It is now the rule that ATC is under a continuing duty to provide current and accurate weather information to anyone with whom it is in contact regardless whether a request is made.[102] The reason for this duty is because ATC is in a superior position to gather weather information and has superior knowledge of air traffic control movement. Pilots, and indirectly passengers, rely on this knowledge. Thus, ATC must go beyond the duties outlined in government manuals and operating regulations. They must advise aircraft of all new and significant weather information that could affect the pilot's decision to take-off or land.[103] This rationale is also applied to wake turbulence warning cases.[104] There is a duty to go beyond the approved manual warning and in the interests of safety either withhold take-off clearance or deny clearance altogether. Legal responsibility rests with the person who is in a superior position to recognize and evaluate the danger and act to prevent an accident. This person is the air traffic controller.

3. *Government Liability for Skyjacking*

The analogy of federal ATC liability to skymarshal or FBI liability under the FTCA is clear. The initial decision to undertake the anti-hijack program was policy-making or planning and thus exempt under the discretionary function rule, but the daily decisions

[101] *See* Ingham v. United States, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967).

[102] Black v. United States, 303 F. Supp. 1249 (N.D. Tex. 1969). In this case, air traffic control failed to give a warning of severe weather conditions existing within the SIGMET's 150-mile radius because the pilot did not specifically ask for it. ATC knew, however, that the plane was heading in the general direction of the adverse weather. The plane subsequently encountered thunderstorms and crashed. *See also* Gill v. United States, 285 F. Supp. 253, (E.D. Tex. 1968).

[103] Neff v. United States, 420 F.2d 115 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1066 (1970). A Mohawk Airlines plane crashed immediately after take-off when it ran into a violent squall line that had just come onto the field. ATC was negligent in its failure to monitor closely the thunderstorm that hit the field, and pass the information on to the aircraft about to take off. The co-pilot's suit against the government, however, was denied on the basis of his contributory negligence.

[104] United States & Baker v. Furumizo, 381 F.2d 965 (9th Cir. 1967). A student pilot and an instructor in a light plane took off behind a large jet. The jet created severe Vortex wake turbulence that caused the light plane to crash. *See also* Hartz v. United States, 387 F.2d 870 (5th Cir. 1968). *But see* Lightenburger v. United States, 460 F.2d 391, 395 (9th Cir. 1972). A twelve-minute persistence of hazardous turbulence from a wing tip vortex was both improbable and unforeseeable.

and actions of federal security personnel on the job are operational and ministerial; accordingly the government is subject to suit if done negligently. Under the *Indian Towing* doctrine, as applied to aviation by the *Union Trust* case, government agents must exercise due care in all their actions even while executing the current "get tough" policy to stop skyjackers. In addition, ATC cases mandate a broad and high degree of care for government activity in aviation matters because the airlines and the fare-paying public place complete reliance on government action to ensure safety of travel. The courts predictably will construe the degree of care liberally in favor of plaintiff passengers and strongly against the defendant government.

Moreover, there is some basis for the application of the doctrine of strict liability,[105] considering the inherent high risk and danger of skyjacking and the extra hazardous counterforce presently being used by the FBI. Several decisions indicate the Supreme Court will not hesitate to apply the same law to the United States as is applied to a private person including law that does not depend for liability on the normal common law breach of duty with respect to reasonable or high care standards.[106]

III. STATE AND FEDERAL LAWS: AIR PIRACY AND OTHER RELATED CRIMES ABOARD AIRCRAFT

A. *State Jurisdiction and Laws*

The authority of states to control the airspace above their territory is based upon the necessity of self-protection, an attribute of

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[105] United States v. Praylou, 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954). A plane owned and operated by the United States Government crashed into plaintiff's barn, destroyed it and seriously injured his children. South Carolina law incorporated provisions of the Uniform Aeronautics Act which provided for absolute liability. The court held the FTCA was intended to cover cases of this sort even though the state law imposed absolute liability for such damage and not merely liability for negligence.

The Government's position that strict liability should not be applied under the FTCA finds support in the dictum of Dalehite v. United States, 346 U.S. 15, 44-45 (1953). Mr. Justice Reed said: "Liability does not arise by virtue either of United States ownership of an inherently dangerous commodity or property, or engaging in an extra hazardous activity." *See also* United States v. Taylor, 236 F.2d 649 (6th Cir. 1956), *cert. granted*, 352 U.S. 963, *cert. dismissed per stipulation* 335 U.S. 801 (1958).

[106] Hess v. United States, 361 U.S. 314 (1960). *See* Dostal, *Aviation Law Under the Federal Tort Claims Act*, 24 FED. B.J. 165-96, 177 (1964).

sovereignty.[107] States have authority, except as limited by the powers granted to the federal government, to regulate in the exercise of their police power for the public welfare and safety.[108] In addition, the Federal Aviation Act of 1958[109] does not pre-empt consistent state law, which includes the right to proscribe and punish crimes committed in a state's territorial airspace. In many respects, state jurisdiction is concurrent with federal jurisdiction: each complements the other.

State criminal codes, therefore, are applicable both to domestic flights of scheduled air carriers and to general aviation. But a formidable jurisdictional problem exists since state officials must prove the alleged criminal act was committed in flight over their territory. This is often difficult, if not impossible, when jet aircraft, traveling at speeds of over 500 miles per hour and at altitudes of over 30,000 feet, are involved.[110] Despite this difficulty, some states have moved to pass protective legislation relating to crimes aboard aircraft.[111]

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[107] W. BISHOP, JR., INTERNATIONAL LAW 369-73 (2d ed. 1962).

[108] Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385 (1930). This is a leading case in air law; it reiterates the common law principle of inherent state sovereignty and jurisdiction over the superjacent airspace above its territory. *See also* Braniff Airways v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590, 597 (1954). Existing federal aviation laws do not exclude the sovereign power of the states.

[109] Federal Aviation Act of 1958, §§ 101 — 1505, 49 U.S.C. §§ 1301 et seq. (1970). The words of the 'saving clause' in 49 U.S.C. § 1506 strengthen this notion.

State jurisdiction is reaffirmed in the legislative history of the 1961 Amendments to the Act—49 U.S.C. § 1472 (a-o)—which specifically deal with federal crimes aboard aircraft in flight. Congress acknowledged this "[d]oes not preempt or replace any state jurisdiction . . . [, it] is in addition to the state criminal law. . . . [T]he Federal government has concurrent jurisdiction with the states." *See* 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess. at 2564-65 (1961).

[110] *See* 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2564-65 (1961) commenting on the 1961 Federal Crimes Aboard Aircraft laws. Congress recognized state officials were often faced with the insuperable task of establishing venue for prosecution. Many serious offenses, as a result, have gone unpunished. The state above which the crime was committed often is not the state in which the aircraft lands. The landing state sometimes has no jurisdiction to arrest the suspected criminal. There are the further problems of extradition and the gathering of evidence from passengers—witnesses who invariably disperse.

The practical problems of state jurisdiction, investigation, arrest and indictment prompted the passage of federal legislation to fill the gap. When a crime also involves violation of federal law, the offender can be taken into custody by federal law-enforcement agents when the aircraft lands and criminal prosecution instituted.

[111] *See, e.g.*, 38 ILL. STAT. ANN. §§ 84-1 *et seq.* (1970 Supp.) which makes

B. *Federal Jurisdiction and Laws*

The Federal Aviation Act of 1958, as supplemented by pre-existing selective criminal statutes, provides excellent jurisdictional and substantive law, not only to proscribe, but also to punish effectively crimes aboard aircraft in flight within the territorial jurisdiction of the United States. Accordingly, there is a growing body of federal criminal common law of air crimes with respect to enforcement and prosecution. This development is indeed timely; it is indispensable to the safety and order of air travel and to the confidence of the fare-paying public. Civil aviation is indebted to this bulwark of federal criminal law since without it "doing business" in interstate or foreign commerce would suffer irreparable harm.

1. *Federal Jurisdiction*

The regulations embodied in the Air Commerce Act of 1926[112] and the Civil Aeronautics Act of 1938[113] were based on the commerce power of Congress, not on national sovereign ownership of airspace.[114] In the Federal Aviation Act of 1958, however, Congress expressly provided that the federal government possessed and exercised complete and exclusive national sovereignity in the airspace of the United States, including the airspace above all inland waters.[115] This ostensibly applied to regulations directed at the intrastate, interstate or foreign sectors; *e.g.*, rules of the Civil Aeronautics Board or Federal Aviation Agency. These administrative bodies are required to exercise their authority consistent with the obligations assumed by the United States in any treaty, convention or agreement with a foreign country.[116]

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it unlawful to bring weapons aboard aircraft, or to be in possession of any firearm, explosive or other lethal or dangerous weapon. Moreover, any person purchasing a ticket consents to a search of his person or personal belongings by the air carrier. The carrier may refuse passage if the searches are objectionable to the prospective passenger. *See also* GA. CODE ANN. § 26-3301 (1969 Supp.) which proscribes the offense of hijacking an aircraft. It further provides a penalty of death or imprisonment upon conviction.

[112] Air Commerce Act of 1926, 44 Stat. 569, 48 Stat. 1113.

[113] Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 979.

[114] Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment, 347 U.S. 590 (1953); Gardner v. Allegheny County, 382 Pa. 2d 88, 114 A.2d 491 (1955).

[115] Federal Aviation Act of 1958, § 1108(a), 49 U.S.C. § 1508(a) (1970).

[116] Federal Aviation Act of 1958, § 1102, 49 U.S.C. § 1502 (1970). When in force, such commitments constitute a part of the law of the land, and override any inconsistent state law or policies. *See* Indemnity Ins. Co. v. Pan American

Federal criminal jurisdiction is unquestionably exclusive with regard to flights outside the territory of the United States even though federal and state governments share criminal jurisdiction intrastate vis-a-vis interstate flights.

Section 101 of the Federal Aviation Act of 1958 contains two sets of key jurisdictional words: (i) "Air Commerce" means interstate, overseas or foreign air commerce, the transportation of mail by aircraft, any operation or navigation of aircraft within the limits of any federal airway or any operation or navigation of aircraft that *directly affects, or which may endanger safety in interstate, overseas or foreign air commerce*;[117] and (ii) "Interstate, Overseas and Foreign Air Commerce" are defined broadly and mean, in effect, any flight whose point of origin, departure or scheduled stop is in the United States, the District of Columbia, a territory or possession of the United States.[118] The operative reach of the criminal jurisdiction under these provisions of the 1958 Act is broad when combined with the section 101(4) language, "which directly affects or which may endanger safety in interstate, overseas, and foreign air commerce" as the latter terms are defined in section 101(20). This hybrid meaning of "air commerce" makes no distinction based either on the registry or nationality of an aircraft. The only criterion is where the aircraft is operating.

Hence, federal laws proscribing crimes aboard aircraft in flight could apply to two categories of flight: (i) a United States air carrier or private business aircraft operating anywhere in the world that originated or intended to terminate its flight in the United States; and (ii) a foreign air carrier operating anywhere in the world if it had already made an intermediate stop or was scheduled to make an intermediate stop in the United States.[119] The constitu-

Airways, 58 F. Supp. 338 (S.D.N.Y. 1944); Garcia v. Pan American Airways, 295 N.Y. 852, 67 N.E.2d 257, 55 N.Y.S.2d 317 (1945), *cert. denied*, 329 U.S. 741 (1946).

[117] Federal Aviation Act of 1958, § 101(4), 49 U.S.C. § 1301(4) (1970) (emphasis added).

[118] Federal Aviation Act of 1958, § 101(20), 49 U.S.C. § 1301(20) (1970).

[119] *See* 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2564-68 (1961). The history of the House Bill shows the intent of Congress with respect to the meaning of "air commerce" in connection with the 1961 Federal Crimes Aboard Aircraft laws.

The term "air commerce" was designedly used because of its broad scope. It will operate to make certain provisions of these criminal laws applicable not only to acts committed on American-flag aircraft in "air commerce" over this

tionality of this kind of extraterritorial effect of federal criminal law is questionable.[120]

2. *Crimes Over The High Seas*

Congressional reaction to the *Cordova* case,[121] which held that an aircraft was not a 'vessel' and thus not within admiralty or maritime jurisdiction, resulted in legislation enlarging federal jurisdiction.[122] The major crimes previously subject to federal jurisdiction when committed aboard a flag vessel were also made subject to federal jurisdiction when committed aboard a flag aircraft operating over the high seas. This was limited jurisdiction, however, since it applied only when a United States flag aircraft was flying outside the jurisdiction of a state, over the high seas or over any other waters within the admiralty and maritime jurisdiction of the United States.

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country or a foreign country, but also to these acts committed on foreign aircraft in "air commerce" over foreign countries if these aircraft are engaged in flights originating at or destined for points in the United States. This will permit the law to protect the large number of American citizens carried by such flights.

The term, "In flight," refers to the airborn part of a flight—the period after the aircraft leaves the ground on take-off to the touchdown on landing. It does not apply to acts committed in the aircraft on the ground.

See also Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention*, 53 VA. L. REV. 535-45 (1967).

[120] United States history and tradition suggest the Supreme Court will be reluctant to apply United States criminal statutes extraterritorially. *See* The Appollon, 22 U.S. (9 Wheat) 362, 370 (1824); Over the Top, 5 F.2d 838 (D. Conn. 1925); United States v. Baker, 136 F. Supp. 546, 549 (S.D.N.Y. 1955); 2 HACKWORTH, INTERNATIONAL LAW 179-203 (1941); Sarker, *The Proper Law of Crime in International Law*, 11 INT'L & COMP. L.Q. 446, 452-56 (1962). *See also* Brown, *Jurisdiction of United States Courts Over Crimes in Aircraft*, 15 STAN. L. REV. 45, 50, 60-61, 74 (1962).

[121] United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950). Cordova assaulted and bit the pilot and a stewardess when they tried to intercede in a quarrel between Cordova and another passenger. Cordova was subsequently charged with two counts: assault by striking, wounding, and beating; and simple assault within the admiralty and maritime jurisdiction of the United States. The court held Cordova could not be successfully prosecuted because an aircraft was not a "vessel" within the "maritime and territorial jurisdiction" of Title 18 § 7. The alleged crime, therefore, was not subject to the jurisdiction of the United States. Criminal jurisdiction of the federal courts is dependent on an act of Congress. The courts do not exercise common-law criminal jurisdiction.

Accord, Bray v. United States, 289 F. 329 (4th Cir. 1923). Federal courts have no common law criminal jurisdiction. To confer jurisdiction on federal courts, federal legislation must specifically enumerate those acts that are offenses and proscribe their punishment.

[122] Crimes: Special Maritime and Territorial Jurisdiction of the United States, 18 U.S.C. § 7(5) (1970).

The crimes codified in Title 18 of the United States Code, are: assault,[123] maiming,[124] larceny,[125] receiving stolen goods,[126] murder,[127] manslaughter,[128] attempts to commit murder or manslaughter,[129] rape,[130] carnal knowledge[131] and robbery.[132] This further enlarged federal jurisdiction by applying this list of crimes to aircraft in flight in "air commerce."

3. *The 1961 Law: Section 902 Crimes of the Federal Aviation Act*[133]

Section 902 of the Act contains a complete listing of all the acts aboard aircraft that the law makes criminal. A topic categorization illustrates not only Congress' concern for the safety of the air passenger, but also the peculiarities of air travel itself. The conduct proscribed includes interference with air navigation, transportation of explosives and other dangerous articles, aircraft piracy, interference with flight crew members, crimes aboard aircraft in flight, carrying weapons aboard aircraft, giving false information, willful damaging of aircraft, embezzlement and theft.

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[123] 18 U.S.C. § 113 (1970).

[124] 18 U.S.C. § 114 (1970).

[125] 18 U.S.C. § 661 (1970).

[126] 18 U.S.C. § 662 (1970).

[127] 18 U.S.C. § 1111 (1970).

[128] 18 U.S.C. § 1112 (1970).

[129] 18 U.S.C. § 1113 (1970).

[130] 18 U.S.C. § 2031 (1970).

[131] 18 U.S.C. § 2032 (1970).

[132] 18 U.S.C. § 2111 (1970).

[133] Federal Aviation Act of 1958, § 902(c), 49 U.S.C. § 1472(c), (h-m) (1970) [hereinafter cited as THE 1958 ACT]. Section 1472 is the criminal penalty provision of the Act. It can be divided into two groups:

(i) THE 1958 CRIMES: Subsec.(c)—Interference With Air Navigation; and subsec.(h)—Transportation of Explosives and Other Dangerous Articles.

(ii) THE 1961 AMENDMENT CRIMES: Subsec.(i)—Aircraft Piracy; Subsec. (j)—Interference With Flight Crew Members or Flight Attendants; subsec.(k)—Certain Crimes Aboard Aircraft in Flight [assault, maiming, larceny, receiving stolen goods, murder, manslaughter, attempts to commit murder or manslaughter, rape, carnal knowledge, robbery, indecent exposure]; subsec.(l)—Carrying Weapons Aboard Aircraft; and subsec. (m)—False information [with respect to (i), (j), (k), & (l)].

Several prominent air lawyers early called for legislation in this regard. *See, e.g.*, Cooper, *Crimes Aboard American Aircraft: Under What Jurisdiction Are They Punishable?*, 37 A.B.A.J. 257, 258 (1951). Stiff penalties were intentionally enacted as a deterrent. Congress realized the offenses, when committed aboard a highspeed aircraft in flight, could jeopardize the lives of a great many people. 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2563-65 (1961).

Subsection (c)[134] proscribes any intentional and knowing interference with or the making of a false air navigation signal at an airport, other navigation facility or elsewhere. The penalty is a fine of up to 5,000 dollars or imprisonment up to five years, or both. A passenger conceivably could commit this crime aboard an aircraft in flight.

Subsection (h) of section 902[135] proscribes the unlawful delivery to an air carrier, or the transportation in air commerce aboard an aircraft, of explosives or other dangerous articles. The penalty is a fine of up to 1,000 dollars or imprisonment up to one year, or both. When death or bodily injury results, however, the penalty is a fine of up to 10,000 dollars or imprisonment up to ten years, or both. Again, a passenger conceivably could commit this crime aboard an aircraft in flight.

Subsection (i)[136] proscribes the crime of "aircraft piracy," which is specifically defined[137] to mean any seizure or exercise of control of an aircraft in flight in air commerce[138] by force or violence or threat of force or violence. The penalty is severe: (i) imprisonment for not less than twenty years; or (ii) death, if affirmatively recommended by a jury verdict or if ordered in the court's discretion should the defendant either plead guilty or plead not guilty and waive a jury trial.[139]

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[134] Federal Aviation Act of 1958, § 902(c), 49 U.S.C. § 1472(c) (1970).

[135] Federal Aviation Act of 1958, § 902(h), 49 U.S.C. § 1472(h) (1970).

[136] Federal Aviation Act of 1958, § 902(i), 49 U.S.C. § 1472(i) (1970).

[137] Congress rejected the proposal that the concept of piracy on the high seas be applied to air commerce. Congress did, however, use the term "aircraft *piracy*" to mean an offense against the law of nations. 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2567 (1961) (emphasis added).

[138] United States v. Healy, 376 U.S. 75 (1964) held that the piracy amendment applied to private as well as to commercial aircraft. In *Healy*, the respondent kidnaped the pilot of a private Cessna 172 airplane and forced him to fly from Florida to Cuba. The district court dismissed the case on the grounds that a private plane was not "an aircraft in flight in air commerce" within the meaning of the air piracy statute; this language was found to apply only to commercial airlines. The Supreme Court disagreed. In reversing, the Court noted that "[a]n aircraft" is on its face an all inclusive term. The Court also decided that the legislative history indicated only section 902(i) [49 U.S.C. § 1472(i)], carrying weapons aboard aircraft, could be limited to commercial air carriers. The other 1961 amendment subsections could apply both to commercial as well as private aircraft. H.R. Rep. No. 958, 87th Cong., 1st Sess. (1961).

[139] Many skyjackers escape arrest by seeking political asylum or refuge in the landing state. The successful prosecution rate is not high even among those who are caught or who return to the United States. Many skyjackers are adjudged

Section 902, Subsection (j)[140] proscribes assaults, intimidation or threats against any flight crew member[141] or attendant (including stewardesses) that interferes with their performance of duties or lessens their ability to perform their duties.[142] The penalty is a fine of up to 10,000 dollars or imprisonment up to twenty years, or both. When a deadly or dangerous weapon is used, however, imprisonment may be for any term of years up to life.[143]

Subsection (k)[144] incorporates by reference all the ten crimes proscribed by section 7 of Title 18 of the United States Code, and even adds one more from section 22-1112 of the District of Columbia Code.[145] It is parallel legislation to the 1962 law covering crimes aboard aircraft in flight over the high seas, even though this enactment further enlarges federal jurisdiction by applying the list of crimes to aircraft in flight in "air commerce."

The purpose of subsection (k) was to provide the umbrella of federal on-ground and on-seas crimes to flights aboard aircraft in flight in air commerce. This provides federal jurisdiction concurrent with state jurisdiction inside the territorial limits of the United States,[146] and exclusive federal jurisdiction outside the country. The

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insane and others are juveniles. More than half of the piracy indictments have resulted in acquittal for insanity or indeterminate sentences given juveniles under the provisions of the Youth Corrections Act. *See, e.g.*, Stephen, *"Going South"—Air Piracy and Unlawful Interference With Air Commerce*, 4 INT'L LAW. 433, 437 (1970); N.Y. Times, Dec. 30, 1971, at 50, col. 1. *See also* news article note 17 *supra*, for a listing of conviction rates.

[140] THE 1958 ACT, *supra* note 133 at § 902(j), 49 U.S.C. § 1472(j).

[141] Mims v. United States, 332 F.2d 944 (10th Cir. 1964) held, on the basis of the *Healy* case *supra* note 138, that this subsection applies to private as well as commercial aircraft. The court also held that the statutory phrase "flight crew members" clearly included the pilot.

[142] The ability of an aircraft's personnel to function efficiently is vitally important to the operation of the aircraft and the safety of those aboard. [Legislative history] 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2570 (1961).

[143] The heavier penalty for the use of a dangerous weapon is appropriate because of the special conditions that exist on an aircraft in flight; *i.e.* the great potential for injury to aircraft personnel and passengers and to the aircraft itself. [Legislative history] 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2570 (1961).

[144] THE 1958 ACT note 133 *supra* at § 902(k)(1), (2).

[145] D.C. CODE ANN. 22-1112 (1970).

[146] In-flight crimes normally involve acts that are offenses under state law, but the difficulties of prosecution under state law make it desirable to provide for concurrent jurisdiction under federal law. [Legislative history] 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2571 (1961).

crimes are: assault,[147] maiming,[148] embezzlement and theft,[149] receiving stolen property,[150] murder,[151] manslaughter,[152] attempt to commit murder or manslaughter,[153] rape,[154] carnal knowledge of a

[147] 18 U.S.C. § 113 (1970). Assault is punishable as follows: (i) with intent to commit murder or rape, by imprisonment up to twenty years (ii) with intent to commit any other felony, by a fine of up to $3,000 or imprisonment up to ten years, or both (iii) with a dangerous weapon without just cause or excuse and intending to do bodily harm, by a fine of up to $1,000 or imprisonment up to five years, or both (iv) striking, beating, or wounding, by a fine up to $500 and imprisonment up to six months, or both (v) simple assault, by a fine up to $300 or imprisonment up to three months, or both.

[148] 18 U.S.C. § 114 (1970). Maiming occurs when one intentionally does any of the following acts to another person: maims; disfigures; cuts; bites; slits the nose, ear or lip; cuts out or disables the tongue; puts out or destroys an eye; cuts off or disables a limb or any other member; and throws or pours upon another scalding water, corrosive acid or caustic substances. The crime is punishable by a fine of up to $1,000 or imprisonment up to seven years, or both.

[149] 18 U.S.C. § 661 (1970). Embezzlement and theft occur when one intentionally takes away the personal property of another. The crime is punishable according to the value or kind of property taken: (i) Over $100, or any value if actually taken from the person of another, by a fine of up to $5,000 or imprisonment up to five years, or both; (ii) All other cases, by a fine of up to $1,000 or imprisonment up to one year, or both; (iii) Allows recovery of the face amount due or secured by any written instrument or evidence of indebtedness so taken.

See, e.g., N.Y. Times, Mar. 7, 1969, at 75, col. 3. A gunman robbed a passenger during a hijacking to Cuba.

[150] 18 U.S.C. § 662 (1970). Receiving Stolen Property occurs when one knowingly buys, receives, or conceals any money, goods, bank notes, or other things that may have been stolen or embezzled. The crime is punishable according to the value of the property taken: (i) Over $100, by a fine of up to $1,000 or imprisonment up to three years, or both; (ii) Less than $100, by a fine of up to $1,000 or imprisonment up to one year, or both.

[151] 18 U.S.C. § 1111 (1970). Murder is defined as the unlawful killing of a human being with malice aforethought.

(i) First Degree Murder is a willful, deliberate, malicious, premeditated killing, or if done with poison, or if a felony-murder done in connection with arson, rape, burglary, or robbery. The penalty is death, or life imprisonment if qualified by a jury verdict.

(ii) Second Degree Murder includes all other killings. The penalty is imprisonment up to life.

[152] 18 U.S.C. § 1112 (1970). Manslaughter constitutes the unlawful killing of a human being without malice.

(i) Voluntary Manslaughter occurs in a sudden quarrel or heat of passion. The penalty is imprisonment up to ten years.

(ii) Involuntary Manslaughter occurs in any other circumstance. The penalty is a fine of up to $1,000 or imprisonment up to three years, or both.

[153] 18 U.S.C. § 1113 (1970). Attempt to Commit Murder or Manslaughter punishable by a fine of up to $1,000 or imprisonment up to three years, or both.

[154] 18 U.S.C. § 2031 (1970). Rape is punishable by death or imprisonment up to life.

female under 16-years,[155] robbery and burglary,[156] and indecent exposure.[157]

Subsection (1) of the 1961 Act[158] proscribes the carrying or possession of a concealed,[159] deadly or dangerous weapon by anyone who attempts to board an aircraft (or while aboard an aircraft) being operated by an air carrier in *air transportation.*[160] The penalty is a fine of up to 1,000 dollars or imprisonment up to one year, or both.[161] There are two general categories of exceptions that allow certain persons to carry arms: (i) law enforcement officers (mu-

[155] 18 U.S.C. § 2032 (1970). Carnal Knowledge of a Female Under Sixteen-Years Old occurs whenever one carnally knows (sexual intercourse) any female, not his wife, under sixteen years of age. The first offense is punishable by imprisonment up to fifteen years, a subsequent offense by imprisonment up to thirty years.

[156] 18 U.S.C. § 2111 (1970). Robbery and Burglary occur when anything of value is taken (larceny) from a person, or from his presence, by force, violence, or intimidation. The crime is punishable by imprisonment up to fifteen years.

[157] 11 D.C. CODE ANN. § 22-1112 (1970). Indecent Exposure occurs when one person makes any obscene or indecent exposure of his body to another person; or makes any lewd, obscene or indecent sexual proposal; or commits any other lewd, obscene or indecent act. The crime is punishable for each offense by a fine of up to $300 or imprisonment up to ninety days, or both; however, there is a fine of up to $1,000 or imprisonment up to one year, or both, if done in the presence of a person under the age of sixteen years old.

[158] THE 1958 ACT, at § 902(i)(1).

[159] Included in this subsection is a weapon in a bag or other container the passenger is holding, or which will be readily accessible to him once on the aircraft. This does not include a weapon in a piece of luggage not accessible to the passenger during the flight. [Legislative history] 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2575 (1961).

[160] The term applies to aircraft being used in commercial operations both while "in flight" and while "not in flight". [Legislative history] 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2552 (1961).

[161] United States v. Brown, 305 F. Supp. 415 (W.D. Tex. 1969) (emphasis added) held there was an unlawful attempt to board an aircraft while carrying a concealed pistol. The passenger *surrendered his ticket* at the Braniff customer service agent's desk and *entered the departure lounge* for the flight covered by the ticket. The court delineated the standard for determining attempt: when an effort to commit a crime has gone past mere preparation and planning which if not stopped would result in the full consummation of the act. Another passenger tipped-off a security guard at the San Antonio International Airport. The guard questioned the accused, and removed the pistol. The court held that the custodial-accusatory stage attached requiring the giving of the *Miranda* warning which the guard failed to do. *See* Note, *Criminal Law—Concealed Weapon—Attempt To Board Aircraft,* 36 J. AIR L. & COM. 370 (1970).

Accord, United States v. Zorrilla, 9 Avi. 17,305 (E.D.N.Y. 1964) held that a ticketed passenger's delivery of his baggage to the air carrier, and his wait at the boarding gate while in possession of a pistol constituted an attempt to board the aircraft while carrying a concealed weapon.

nicipal, state and federal) if authorized to carry weapons; and (ii) any other person authorized to carry arms pursuant to a regulation issued by the Administrator of the Federal Aviation Administration.

Subsection (m)[162] proscribes the giving of false information[163] concerning an attempt or alleged attempt to commit a crime prohibited by subsections (i), (j), (k) or (l) of section 902. To do so knowingly subjects the offender to a fine of 1,000 dollars or imprisonment up to one year, or both. To do so willfully and maliciously or with reckless disregard for the safety of human life subjects the offender to a fine of up to 5,000 dollars or imprisonment up to five years, or both.

4. *Willful Damaging of Aircraft*

An act separate from section 901[164] makes it unlawful for anyone intentionally and willfully to set fire to, damage, destroy, disable or wreck any civil aircraft, aircraft part, air cargo or air navigation facility relating to interstate, overseas or foreign air commerce. In addition, it is unlawful to incapacitate any crew member.

An attempt subjects the offender to a fine of up to 10,000 dollars or imprisonment up to twenty years, or both. If someone is killed as a result of any of these unlawful acts, the death penalty may be imposed if affirmatively recommended by a jury verdict or if so ordered in the court's discretion should the defendant either plead guilty or plead not guilty and waive a jury trial.[165]

5. *Embezzlement and Theft*

Another separate act[166] makes it a crime to embezzle, steal or unlawfully take: (i) an aircraft operated by any common carrier

[162] THE 1958 ACT at § 902(m).

[163] The subsection was written into law to deter false reports of information concerning such crimes in view of the wide publicity given skyjackings and bombings of aircraft. [Legislative history] 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2575 (1961).

[164] Act of July 14, 1956, 18 U.S.C. §§ 31-35 (1970). *See* Havelock v. United States, 427 F.2d 987 (10th Cir. 1970). This case involved arson aboard an aircraft in flight; a fire was set to materials in a restroom.

Skyjackers who threaten to discharge explosives in order to coerce the pilot are in violation of the "Bomb Hoax" statute, 18 U.S.C. § 35 (1970). *See* Carlson v. United States, 296 F.2d 909 (9th Cir. 1961); Comment, *Criminal Law—Aviation-Bomb Hoax*, 30 J. AIR L. & COM. 390 (1964). *See also* 18 U.S.C. § 34 (1970); 15 U.S.C. § 1281 (1970).

[165] *See* Epperson case, note 1 *supra*.

[166] Act of June 25, 1948, 18 U.S.C. §§ 659, 660 (1970).

moving in interstate or foreign commerce; or (ii) any money, baggage, goods or chattel whatsover from a passenger. The act also makes it unlawful to receive this stolen or embezzled property knowlingly. The crime is punishable according to the value of the property taken: (i) over 100 dollars by a fine up to 5,000 dollars or imprisonment up to ten years, or both; and (ii) less than 100 dollars by a fine up to 1,000 dollars or imprisonment up to one year, or both.

These provisions should be considered supplementary to the parallel provisions in section 902 of the Federal Aviation Act; *i.e.*, supplementary to subsection 902(i), air piracy, and subsection 902(k), regarding embezzlement, theft and receiving stolen property.

C. *Investigation and Enforcement*

1. *FBI Investigations*

Section 902(n) of the Federal Aviation Act of 1958[167] simply provides that violations of subsections (i) through (m) shall be investigated by the Federal Bureau of Investigation of the Department of Justice because the FBI has personnel especially trained in the detection of crime and apprehension of criminals. This is an adjunct to the investigatory authority already vested in the Federal Aviation Agency and the Civil Aeronautics Board, both of which are usually limited to civil and regulatory investigations.[168]

2. *Venue of Criminal Prosecutions*

Section 903(a) of the 1958 Act provides for venue to be in the district where the offense was committed.[169] If the commission of an offense is begun in one district and completed in another, then the accused may be tried in any of the districts where the crime was begun, continued or completed.

On the other hand, when a crime is committed beyond the jurisdiction of a particular state or district (*e.g.*, outside the territorial limits of the United States), the offender may be tried in the district in which he or one of his accomplices is arrested or first brought before a magistrate.

If the suspects are not arrested or brought into any district, an

[167] THE 1958 ACT at § 902(n).

[168] [Legislative history] 2 U.S. CODE CONG. & AD. NEWS, 87th Cong., 1st Sess., at 2576 (1961).

[169] Federal Aviation Act of 1958, 49 U.S.C. § 1473(a) (1970).

indictment or information may be filed in the district of last known residence of one of the offenders, or if residence is unknown, in the District of Columbia. This prevents the running of the statute of limitations applicable to an offense committed outside the United States when the offender remains abroad.[170]

D. *The Constitutionality of Preboard Screening*

The primary method for combating the threat of skyjacking is the preboard screening system developed by the FAA. This screening system is composed of a hijacker behavioral profile coupled with a magnetometer weapons detection device.[171] The hijacker behavioral profile is a psychological profile of hijacker identification characteristics compiled from actual case studies of skyjackers performed by Dr. John Dailey, the chief of the FAA's psychology staff.[172] The magnetometer weapons detection device is a unique weapons detector employing two aluminum pole sensors—one on each side of a boarding gate—connected to a read-out instrument. The device measures deviations in a magnetic field and is calibrated to discriminate between different types of weapons such as guns and knives.[173] Airlines are now required by law to use this anti-hijack system.[174] The system is being credited with success[175] and

[170] In the case of a capital offense, an indictment may be filed at any time, without limitation. *See* 18 U.S.C. § 3281 (1970). In the case of lesser offenses, however, the indictment or information must be filed within five years after the offense is committed. *See* 18 U.S.C. § 3282 (1970).

See also 18 U.S.C. § 3290 (1970); McGowen v. United States, 105 F.2d 791 (D.C. Cir. 1930). Once a person becomes a fugitive from justice, the statute of limitations will no longer run. A fugitive, therefore, will never gain immunity. *Contra*, United States v. Parrino, 180 F.2d 613 (2d Cir. 1950).

[171] *See* LIFE, Aug. 11, 1972, at 30; U.S. NEWS & WORLD REPORT, Jan. 31, 1972, at 33-34.

[172] *See* note 29 *supra*.

[173] Schultz, *How The Airlines Hope To Stop The Hijackers*, POPULAR MECHANICS, May 1970, at 83-85.

The magnetometer measures disturbances (or deviations) in the earth's magnetic field caused when ferrous-metal objects pass nearby. FAA engineers have determined the degree of magnetic field disturbances created by weapons of different sizes. Metal emits a force proportional to its mass. Disturbances created by a gun are greater than those created by a knife, or even keys.

Of course, this device would be of questionable use to detect zip guns made primarily of wood, plastic explosives, and vials of acid or nitroglycerine. Toothman, *Legal Problems Of Skyjacking*, [1969] A.B.A. SECT. INS. N.&C.L. 251,257 (1969).

[174] *See* Security Rules.

[175] According to the June 1972 FAA report, 170,078 persons underwent special security checks because they appeared to fit the hijacker profile; 453 were

passengers even seem to approve these increased security measures in spite of obvious inconveniences.[176]

1. *Applicability of the Fourth Amendment*

The United States Constitution[177] prohibits "unreasonable" searches and seizures; that is, those not incident to a lawful arrest or not authorized by a search warrant.[178] In addition, the Supreme Court has held that the fourth amendment prohibits the fruits of an illegal search and seizure from being introduced and used against a defendant. This constitutional protection is enforced against both federal and state governments.[179] Query, whether the scan by a

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denied boarding either because they could not properly identify themselves or were guilty of some law violation. Of this group, 148 were arrested—16 for various phases of air piracy, 60 on narcotics charges, 14 for possession of handguns, 4 for being fugitives from other jurisdictions, and 54 for immigration violations and other offenses. The Spokesman-Review, Aug. 14, 1972, at 9, col. 3.

FBI and FAA officials claim successful skyjackings are on the decline. In the first four months of 1972, 626 persons were arrested—14 while aboard aircraft. Nearly 8,000 weapons of all kinds were confiscated, many of them found around terminals—presumably discarded by scared-off skyjackers. U.S. NEWS & WORLD REPORT, July 3, 1972, at 13; LIFE, Aug. 11, 1972, at 30; U.S. NEWS & WORLD REPORT, Apr. 24, 1972, at 23.

[176] *See* interviews with selected airline officials, P. Bird, *Hijacking Revisited*, May 1972 (unpublished paper in SMU Law School Library) at 27-28, 31-32.

[177] U.S. CONST. amend. IV guarantees: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

See generally, Comment, *Consent Searches—Relinquishment Of Fourth Amendment Rights—The Need For A Warning*, 5 GONZAGA L. REV. 315-23 (1970); Comment, *Constitutional Standards For Stop And Frisk: Guidelines And Implementation*, 5 CAL. W. L. REV. 265-86 (1969); Comment, *The Expanding Power Of Police To Search And Seize: Effect Of Recent U.S. Supreme Court Decisions On Criminal Investigation*, 40 U. CAL. L. REV. 491-508 (1968); Comment, *The Need For A Warning Prior To A Waiver Of The Fourth Amendment*, 10 SANTA CLARA LAW. 205-21 (1969); Note, *Delivery Of Container To Airline For Shipment Does Not Create Exigent Circumstances Permitting Search Without Warrant*, 7 SAN DIEGO L. REV. 332-40 (1970); Note, *Is Electronic Surveillance By Bugged Agents A Search And Seizure Within The Fourth Amendment?*, 14 VILL. L. REV. 758-64 (1969).

[178] A search may be made without a warrant if it is incident to an arrest and is limited to the area under the immediate control of the accused. Chimel v. California, 395 U.S. 752 (1969). The Constitution does not forbid searches and seizures unless they are "unreasonable." Elkins v. United States, 364 U.S. 206, 222 (1960).

[179] The "exclusionary" rule of evidence was first enunciated by the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914). This rule was made applicable to the states through the due process clause of the Fourteenth Amendment

magnetometer is a "search" within the meaning of the fourth amendment? It emits no energy like an X-ray. Also, it is a passive measuring instrument and only registers a magnetic deviation caused by the metal objects the passenger carries. The question may now be moot since the Fourth Circuit recently held the magnetometer scan to be a "search" in the constitutional sense.[180] Other circuit courts, however, may not agree.

Because the fourth amendment protection does not apply to the conduct of private individuals, evidence illegally seized by private persons is admissable against a defendant.[181] Thus, on its face the preboard search by the airlines would presumably be free from constitutional constraints. The government, however, is intimately involved in the preboard screening program through the FAA. For example, the FAA has furnished the technology and the training for the security systems and sky-marshals work alongside airline personnel. There is more than close cooperation between the government and the airlines on the anti-hijack program; it is a highly coordinated and integrated enterprise. This connection is so close that for purposes of preboard screening the airlines are arguably acting as agents of the police aiding in the enforcement of federal law.[182] The entire preboard screening program, then, is presumably subject to constitutional scrutiny.

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in the case of Mapp v. Ohio, 367 U.S. 643 (1961). The rule, therefore, applies to governmental action be it state or federal.

[180] The court found there was no difference between a search done electronically and one done physically by a frisk: "[I]t is still a search. Indeed, that is the sole purpose and function of a magnetometer: to search for metal and disclose its presence in areas where there is a normal expectation of privacy." United States v. Epperson, 454 F.2d 769, 770 (4th Cir. 1972). *See also* United States v. Lopez, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971). "In effect the system itself, communicating through the airline, acts as an informer providing information leading to interview and search. [T]he informant is an objective system, not an individual . . . ." *Cf.* United States v. Bigos, 459 F.2d 639, 641-42 (5th Cir. 1972).

But see United States v. Millen, 338 F. Supp. 747, 753 (E.D. Wisc. 1972): "[A]n examination by law enforcement agents of a person's hands under a flourescent light *while he is in custody* does not constitute a search subject to Fourth Amendment constraints (emphasis added)."

[181] Burdeau v. McDowell, 256 U.S. 465 (1921); Watson v. United States, 391 F.2d 927 (5th Cir.), *cert. denied*, 393 U.S. 985 (1968); United States v. Goldberg, 330 F.2d 30 (3d Cir. 1964).

[182] *See, e.g.*, United States v. Lopez, 328 F. Supp. 1077, 1092 (E.D.N.Y. 1971). "In the case before us the testimony indicated that the airlines personnel at the boarding area act in close conjunction with the U.S. Marshals in a combined effort to thwart potential hijackers. While the Marshals ultimately perform the

The Supreme Court has established a high standard for non-participatory electronic surveillance.[183] In announcing a test to determine whether electronic surveillance is an unlawful search and seizure, the Court rejected the earlier requirement that there be a physical trespass of the person or his environment in favor of whether the questioned conduct "violated the privacy upon which the person justifiably relied."[184] An electronic search is constitutional only if it does not violate this standard of personal privacy—a standard necessarily defined on a case by case basis. The Court, on the other hand, has said a "stop and frisk" is reasonable and comports with fourth amendment safeguards if the police officer was able "to point to specific and articulable facts which reasonably warrant an inference of criminal behavior."[185] An unparticularized suspicion or "hunch" is not enough. The officer is entitled to draw an inference of criminal behavior only from specific facts in light of his experience. This constitutionally validates the "stop." Even then the scope of the "frisk" must be limited to a pat-down of the outside of the suspect's clothing. An entry of the clothing is not permitted unless an object is discovered that is believed to be a weapon or gives probable cause to arrest.

2. *Passenger Screening*

Two federal district courts[186] and the Fourth Circuit[187] have held the preboard screening system developed by the FAA to be constitutional. These decisions have clarified some of the more important issues and have provided guidelines for the airline industry and

'frisk' it is the airline employees who have primary responsibility for applying the profile and designating 'selectees'."

[183] Katz v. United States, 389 U.S. 347 (1967). The eavesdropping was done by means of an electronic listening device attached to the outside of a telephone booth.

[184] *Id.*

[185] Terry v. Ohio, 392 U.S. 1 (1968). The "reasonableness" of a stop is determined by balancing the interests of society in investigating possible criminal behavior against the intrusion of the individual's privacy. The interest which justifies the pat-down is not that of society, but that of protecting the officer during the stop—he may frisk to minimize the threat of physical harm to himself. *Accord,* Vale v. Louisiana, 399 U.S. 30 (1970).

[186] United States v. Bell, 335 F. Supp. 797 (E.D.N.Y. 1971) [hereinafter cited *Bell*]; United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) [hereinafter cited *Lopez*]. *Lopez* was the first preboard screening case; it is a thorough, even exhaustive, treatment of the subject.

[187] United States v. Epperson, 454 F.2d 769 (4th Cir. 1972) [hereinafter cited *Epperson*].

other courts to follow. Further refinements and developments in the law, however, should be expected as other district and circuit courts deal with the problem. The Supreme Court may not need to consider the problem[188] if these decisions continue to show uniformity.

The screening system administered by the airlines uses several techniques that collectively reduce the number of passengers who may have to submit to a "stop and frisk"[189] by a Deputy United States Marshall—an eventuality to which all passengers are alerted by large signs,[190] both in English and Spanish, prominently displayed in boarding areas. The airlines, of course, must be very careful not to detain or humiliate the passenger unnecessarily.[191] This presumably also applies to federal marshals.

The basic elements of the passenger screening system, and the typical routine followed in its application,[192] may be outlined as follows:

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[188] Each is well grounded upon respectable Supreme Court and circuit court "search and seizure" cases. *See, e.g.*, citations, notes 185 & 186, *supra.*

[189] *See Bell*, note 186 *supra* at 802. "Had the decision to stop and frisk been made solely on the basis of activating the device [about 50% of the passengers trigger its magnetic field], the court might have reached a different result. But the magnetometer is only one of a series of screening procedures . . . ." *See also Lopez*, note 186 *supra* at 100. "[T]he use of the magnetometer might be an objectionable intrusion were it not accompanied by an antecedent warning from the profile indicating a need to focus particular attention on the subject."

[190] The signs inform passengers that they and their baggage are subject to electronic or physical search for weapons; the signs also warn passengers of the mandatory minimum 20-year prison sentence and the maximum sentence of death for air piracy. The courts have not accepted the argument that this constitutes an "implied consent" on the part of the passenger for a subsequent "search and seizure." *See Lopez*, note 186 *supra* at 1092. Consent to a search involves a relinquishment of fundamental constitutional rights; to be valid, the consent must be unequivocal, specific, and intelligently given. *See, e.g.*, United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963); Channel v. United States, 285 F.2d 217, 219-20 (9th Cir. 1960). The mere reading of these signs, the *Lopez* court felt, did not effect such a waiver.

[191] *See, e.g.*, Delta Airlines v. Porter, 70 Ga. 152, 27 S.E.2d 758 (Ga. C.A. 1943). In this case, the passenger was wrongfully ejected from the plane. He was not allowed to re-board after an intermediate stop even though traveling on a through ticket. The court said this was a technical battery: wrongful interference with contract rights. The passenger was not required to physically resist, but had a right to yield to authority and throw himself on the law as his remedy. The passenger recovered actual compensatory damages for the breach of contract of carriage. He was also awarded consequential damages for injury to feeling, suffering, humiliation, emabarrassment, and inconvenience. Moreover, punitive damages were awarded to deter the airline's highhanded and wrongful conduct.

[192] *See Lopez*, note 186 *supra* at 1082-85.

(i) *Behavioral Profile.* At the ticket counter the passenger is visually compared with the skyjacker identification characteristics of the psychological-behavioral profile.[193] If there is a match, then that passenger becomes a "selectee" and is focused on by airline employees. The airlines must "scrupulously [apply] the [FAA developed] profile without any additions or subtractions"[194] in view of the "disquieting implications of the system."[195] This preserves its judicially approved "essential neutrality and objectivity" and prevents violation of the traditional equal protection standards.[196]

[193] The *Lopez* court permitted only an *in camera* disclosure, excluding from the courtroom the public and the defendant, when it took testimony which revealed the specific characteristics included in the profile. The court did this because "were even one characteristic of the 'profile' generally revealed, the system could be seriously undermined . . . ." The defendant, a narcotic addict and suspected dealer, "would feel no compunction about telling what he knew to all who would lend an ear in prison or out." *Id.* at 1086. The Fifth Amendment guarantee of a public trial was not impinged, according to Judge Weinstein, because "the danger in revealing the profile is so great as to warrant the public's exclusion for a limited period." *Id.* at 1088. Moreover, the Sixth Amendment guarantee of the right to counsel was held not offended since defense counsel was present throughout the testimony and cross-examined the witnesses thoroughly. "Adversarial advocacy" was preserved. *Id.* at 1088, 1091. The court went on to draw an analogy to the "informer" line of cases which permit just such an *in camera* examination. *Id.* at 1090-92.

[194] *See Bell,* note 186 *supra* at 801.

[195] *See Lopez,* note 186 *supra* at 1100. "Employing a combination of psychological, sociological, and physical sciences to screen, inspect and categorize unsuspecting citizens raises visions of abuse in our increasingly technological society." The court went on to say: "[O]ur criminal law is based on the theory that we do not condemn people because they are potentially dangerous. We only prosecute illegal acts."

[196] *Id.* at 1086-87, 1101. "Those characteristics selected [by the original 1969 FAA task force and continuously updated since as new hijackings occur] can be easily observed without exercising judgment. They do not discriminate against any group on the basis of religion, origin, political views, or race. They are precisely designed to select only those who present a high probability of being dangerous."

The airline in *Lopez,* however, made a critical error. It departed from strict adherence to the approved FAA behavioral profile by eliminating one of its "fundamental characteristics" and by adding two others, one of which "introduced an ethnic element for which there was no experimental basis" and another "added criterion [which] called for an act of individual judgment on the part of the airline employee." The effect of these changes, the court found, was "to destroy the essential neutrality and objectivity of the approved profile." The court concluded: "The approved system survives constitutional scrutiny only by its careful adherence to absolute objectivity and neutrality. When elements of discretion and prejudice are interjected it becomes constitutionally impermissible." The court refused to admit into evidence the fruits of this unconstitutional seizure, saying that "while the abuse . . . was by airline officials, not the government, these employees were acting as government agents insofar as they designated 'selectees' and alerted Marshals."

(ii) *Magnetometer Scan.* A "selectee" is carefully monitored when he undergoes the magnetometer scan. Should it register the presence of metal objects the size of weapons,[197] the passenger is stopped and questioned by airline security personnel. The "selectee" is asked to produce identification and then asked whether he is carrying any concealed weapons. Satisfactory identification and answers usually result in the passenger being allowed to board the aircraft.

The reasonableness of the magnetometer "search" was recently affirmed by the Fourth Circuit employing the "balancing" test used by the Supreme Court in *Terry v. Ohio*,[198] *i.e.*, balancing the governmental interest in searching against the invasion of privacy to the individual. The Fourth Circuit stated: "We think the search *for the sole purpose of discovering weapons and preventing air piracy*, and not for the purpose of discovering weapons and pre-criminal events, fully justified the minimal invasion of personal privacy by the magnetometer."[199] The court went on to say: "The danger is so well known, the government interest so overwhelming, and the invasion of privacy so minimal, that the warrant requirement is excused by exigent national circumstances."[200] Finally, the court concluded:

> It is clear to us that to innocent passengers the use of a magnetometer to detect metal on those boarding an aircraft is not a resented intrusion on privacy, but, instead, a welcome reassurance of safety. Such a search is more than reasonable; it is a compelling necessity to protect essential air commerce and the lives of passengers.[201]

(iii) *Stop and Frisk.* A federal deputy marshal is summoned[202] if the "selectee" fails to identify himself satisfactorily or explain the presence of weapon-sized metal objects on this person. The

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[197] *See* note 173 *supra*, and accompanying text. *See also Bell*, note 186 *supra* at 802.

[198] 392 U.S. 1 (1968). *See* discussion, note 185 *supra*. *See also* United States v. Davis, 459 F.2d 458, 459 (9th Cir. 1972) for an example of an unjustified police stop violating the *Terry v. Ohio* "balancing" test.

[199] *Epperson*, note 187 *supra* at 771.

[200] *Id.* To require a search warrant as a prerequisite to the use of a magnetometer, the court believed, would exalt form over substance.

[201] *Id.* at 772.

[202] *See Lopez*, note 186 *supra* at 1083.

marshal again requests identification and typically asks the person to go through the magnetometer once more. Should this fail to resolve things, the passenger is then asked to submit to a voluntary search.[203] The marshal pats-down the external clothing to discover if the suspect is carrying any concealed weapons. Depending on what is found, boarding is permitted or the person is detained. All this is done out of view of the general public.

Preboard "stop and frisks" likewise have been judicially approved as constitutional, again principally on the basis of *Terry v. Ohio*.[204] The Fourth Circuit found this kind of search to be reasonable under the fourth amendment "since the use of the magnetometer was justified at its inception, and since the subsequent physical frisk was justified by the information developed by the magnetometer, and since the search was limited in scope solely to a search for weapons . . . ."[205] There is, in effect, a cumulative development of probable cause: initially from the behavioral profile, and secondly from the magnetometer. The quantum of suspicion rises even further on failure of the passenger to identify himself adequately or to answer questions about carrying concealed weapons. There is then substantive probable cause to make a physical search. The Fourth Circuit additionally found that "the deputy marshal was advancing a serious government interest—the prevention of air piracy, a crime normally committed with a dangerous weapon that could potentially cause death or serious injury to many innocent bystanders."[206]

Whatever evidence is ultimately seized during preboard screening, (*e.g.*, weapons, contraband or narcotics), of course, may be

[203] The *Bell* court, note 186 *supra* at 803, upheld the "stop and frisk" on the ground that the search was one for weapons; *e.g.*, where a reasonably prudent officer has reason to believe the person to be searched is armed and dangerous, and that the officer's safety or the safety of others is endangered. The court did not try to uphold it as a "consent" search even though the defendant admittedly said "sure" to a deputy marshal's request to make a custodial frisk. *See* note 172 *supra* for a discussion of the high standard which must be met to support a "consent" search.

[204] *See* note 198 *supra*.

[205] *Epperson*, note 187 *supra* at 172. *Accord, Bell*, note 186 *supra* at 803.

[206] *Epperson*, note 187 *supra* at 772. "Here," continued the court, "the search was conducted because an objective system used to detect air pirates had indicated that the defendant was one of a class of less than 1% of all air passengers; *i.e.*, a potentially armed and dangerous air pirate (citing *Lopez* at 1084, 1097). Furthermore, of that select group, almost 6% of those actually frisked were found to have a weapon. On balance then, the court finds the intrusion into the defendant's person by the frisk search for weapons justifiable and constitutional."

introduced at trial against the defendant as the "fruits" of a constitutional search.[207]

3. *Baggage Screening*

The mandate against unreasonable searches and seizures also applies to the inspection of passenger luggage.[208] The rule is well-established: Airlines, in their "private capacity,"[209] may constitutionally search a person's luggage without a warrant solely for safety reasons or to discover possible tariff violations.[210] The courts, however, have not permitted baggage inspections conducted in response to police suggestion when the only purpose is to discover contraband (*e.g.*, narcotics) bearing no relation to aircraft safety and security.[211] This presumably is still the law. The new FAA

[207] *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969). *See also* note 158 *supra.*

[208] *See* note 177 *supra.*

[209] *See* note 181 *supra.*

[210] The suspicion of an airline employee caused him to hold a passenger's suitcase at the airport after the flight left. The employee unlocked the suitcase and found watch movements. He reported this to customs officers who took possession of the suitcase. The customs officers later arrested the passenger for receiving unlawfully imported watch movements. The court held the watch movements were admissible into evidence. The airline had acted within its private capacity; there had been no "search" within the constitutional meaning of the term. Wolf Low v. United States, 391 F.2d 61 (9th Cir. 1968), *cert. denied*, 393 U.S. 849 (1968).

See also Gold v. United States, 378 F.2d 588 (9th Cir. 1967); United States v. Burton, 341 F. Supp. 302 (W.D. Mo. 1972). The court, in the latter case, observed: "Mr. Webster [airline employee] was serving the purpose of his employer in investigating a suitcase which he, relying on his twenty-five years of experience and the recently developed behavioral pattern profiles, believed to contain unusual and perhaps dangerous articles. . . . Certainly the airline had a responsibility for the protection of the lives and safety of these passengers, and an interest in protecting its financial investment in the plane and equipment. . . . [T]he search . . . was not so connected with government participation or influence as to be characterized as a federal search cast in the form of carrier inspection, but rather the search was an independent investigation by the carrier for its own purposes." *Id.* at 306.

[211] *See* Corngold v. United States, 367 F.2d 1 (9th Cir. 1966). The initial search of packages by the airline employee was in the presence of and at the specific request of government agents. The court characterized this as a government search. The fruits of this unlawful search were inadmissible.

See also People v. McGrew, 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969), *cert. denied*, 398 U.S. 909 (1971). McGrew left a locked footlocker with United Airlines freight office to be shipped. Police had earlier cautioned the airlines to be on the alert for footlockers and suspicious looking hippie types who might try to ship marijuana this way. The freight agent broke into McGrew's footlocker and found some packages. The packages were turned over to state narcotics agents who determined they contained marijuana. The California Su-

regulations[212] requiring baggage searches make the situation a particularly sensitive one for the airlines. If they are not careful, the fruits of these searches may be inadmissible. The passenger, in the proper fact situation, could raise a good constitutional defense: Airline personnel acted ostensibly as government agents for police purposes without a search warrant and conducted a preboard baggage search unrelated to airline safety or security.

To further protect themselves, the air carriers will probably want to file amended tariffs[213] with the Civil Aeronautics Board seeking approval to search passenger carry-on and stow-away baggage for "weapons and explosives or other objects which may be inimical to safety or security of flight."[214] These qualifying words are highly important; they key on a legitimate airline interest. The CAB, under the filed tariff doctrine,[215] has the authority to approve the

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preme Court held that the initial search by the airline employee was conducted solely for police purposes and in response to police suggestion. The court said:

(i) There was no consent to the search because the tariff provision granting the right was not spelled out on the freight document, but only incorporated by reference. One can contract to permit a search provided it is knowing and intentional. Stoner v. California, 376 U.S. 483 (1964); Zap v. United States, 328 U.S. 624 (1945); Cipes v. United States, 343 F.2d 95 (9th Cir. 1965).

(ii) The airline had implied consent to inspect only for airline purposes; *e.g.*, for aircraft safety or tariff rate violations. A search for contraband was totally unrelated to the interests of the airlines. Exigent circumstances sufficient to permit a search without a warrant did not exist.

[212] *See* Security Rules.

[213] All of the airlines have the tariff right to refuse to carry passengers who will not consent to be searched. Tariff 6(A) reads, in part: "Carrier will refuse to transport or will remove at any point, any passenger who refuses to permit search of his person or property for concealed, deadly or dangerous weapons." *See* Rule 6(A)(3)(a) & (b), Local and Joint Pasesnger Rules Tariff No. PR-5, C.A.B. No. 117 (Oct. 27, 1968).

The CAB notified the FAA in March of 1969, that the following provision was added to the Eastern Air Lines tariff: "Passengers and baggage are subject to inspection with an electronic detector with or without passengers' consent or knowledge." *FAA Memorandum, CC-I* (Mar. 21, 1969).

[214] *See* note 47 *supra.*

[215] Tariffs filed with and approved by the Civil Aeronautics Board (CAB) become part of the contract of carriage between the airline and the passenger. 49 U.S.C. § 1373 (1970). The CAB, under the doctrine of primary jurisdiction, determines in the first instance the "reasonableness" of tariffs. This is within its regulatory authority as delegated by Congress, and within the exercise of its administrative expertise. The provisions of an approved tariff are deemed valid until rejected by the CAB. Lichten v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951). Filed tariffs are binding on the passenger despite lack of knowledge or assent. Tannenbaum v. National Airlines, Inc., 176 N.Y.S.2d 400 (N.Y. Sup. 1958). For example: Noncompliance with an airline traiff requiring filing of a

"reasonableness" of all the terms and conditions relating to air carriage. This includes inspection of passenger baggage. Approved tariff provisions, of course, become part of the contract of carriage between the airlines and their passengers. The air carrier protectively can get CAB tariff approval to conduct preboard baggage searches whether or not the passenger has knowledge or consents to the search. The inherent danger and risk in skyjacking provides ample public policy and police power reasons to allow this type of preboard screening. Exigent circumstances exist.

IV. CONCLUSION

Skyjacking has become a problem of international dimensions. Its genesis lies in the peculiar admixture of cold war politics with the unique technology of commercial jet travel. A skyjack manifests a multitude of complicated personal and political frustrations that are actualized when an aircraft is unlawfully seized. The jet aircraft in flight is externally a symbol of prestige and prowess; internally it is vulnerable. The skyjacker ostensibly acts against pilots and crew; but the primary and effectual coercion is always against the lives and safety of the passengers. The economic lifeblood of commercial civil aviation are passengers. Without them, airlines would be out of business. Skyjacks threaten this basic economic condition.

Crimes aboard aircraft are now legally proscribed. Federal and state governments may share jurisdiction intrastate, but it is federal criminal law that is exclusive for interstate and foreign flights. The list of federal crimes aboard aircraft in flight is comprehensive: assault, maiming, larceny, receiving stolen goods, robbery, embezzlement, theft, murder, manslaughter, rape, indecent exposure, carnal knowledge of a female under sixteen years of age, carrying weapons aboard aircraft, air piracy, interference with flight crew members, transportation of explosives and willful damaging of aircraft. Civil aviation in general, and the fare-paying public in particular, are the real beneficiaries of these laws.

Laws alone, however, are not enough to stop skyjackers. The federal government and the airlines, therefore, have jointly under-

claim for lost baggage within thirty days bars recovery by the passenger. Migoski v. Eastern Airlines, Inc., 63 So. 2d 634 (Fla. 1953).

See also notes 84-86 *supra.*

taken a comprehensive anti-hijack program. Both industry and government closely cooperate with each other. The program is highly integrated. The airlines use both the preboard screening techniques employing the FAA-developed skyjacker behavioral profile and the magnetometer weapons-detector. The federal government uses deputy marshals at boarding stations to conduct "stop and frisks"; and special FBI teams are even being used by the government in a new "get tough" policy to stop the skyjacker who has commandeered a plane. All this is done in the interests of aviation safety to protect the traveling public.

Preboard screening by airlines acting pursuant to FAA regulations is subject to the constitutional prohibition against "unreasonable" searches and seizures contained in the fourth amendment. The courts have held that only a "scrupulous" adherence without deviation to the approved FAA screening system will be considered "reasonable." The governmental interest in protecting passengers against the extreme dangers inherent in skyjacking, on balance, have been held to outweigh the minimal invasion of personal privacy. Moreover, a subsequent "stop and frisk" for weapons by a deputy marshal is justified since the antecedent profile and magnetometer screening supplies the necessary probable cause for a body search. The marshal searches a suspect to protect not only his immediate person, but also to alleviate a potential threat to the safety of innocent passengers. Arguably, the preboard inspection of passenger carry-on and stow-away baggage is likewise "reasonable" under this same principle if done to serve the legitimate airline interest of safety and security of flight. The searches are constitutionally suspect, however, if done primarily for police purposes unrelated to this fundamental airline interest.

Skyjacks have resulted in numerous injuries to pilots and crew, and several deaths. Unfortunately, passengers are no longer free from personal violence. Recent skyjackings have culminated in injuries and deaths to passengers. Every skyjack potentially is a liability creating situation. Passengers can suffer damage in many ways and the airlines are presumably liable to the skyjack victim. Breach of statutory or regulatory duties and breach of the common law duty of care are two recovery theories that may be used. Of these, breach of the duty of care is the most reliable; it has been frequently and successfully used in aircraft litigation. United States

citizen passengers have a statutory right not only to freedom of air transit, but also to safe and adequate service. The common carrier airline is obligated to provide a safe and properly equipped aircraft as well as a skillful pilot and crew. The air carrier owes its passengers a basic and fundamental duty: the highest and utmost degree of care for safety of flight. A breach of any of these duties imports liability. This is so even in the face of the known skyjack threat.

The most promising, yet apparently untried theory of recovery, lies against the federal government, which may be sued for the negligence of its employees under the Federal Tort Claims Act. The decisional law is unmistakably clear—the voluntary and gratuitous decision of the government to undertake the anti-hijack program initially was policy making and planning and is exempt under the discretionary function rule; but the daily on the job actions of the FBI, deputy marshals and other federal employees are operational and ministerial for which the government is liable if done negligently. The government is committed to a program to stop skyjackers and skyjackings. This it must do, and do with due care. Passengers, and even airlines, rely on the anti-hijack program to ensure safety of air travel. The government owes the air passenger a duty of highest care in this regard. A breach is actionable. This theory of recovery is advanced as consistent with the government liability developed in the air traffic control cases.

Skyjack law, both civil and criminal, is in metamorphosis. The civil liability aspects are ripe for litigation, while the law relating to criminal proscriptions is more firmly established. Further change is to be expected; however, this undoubtedly will take place within the existing framework of air law precedent. Much of this process will depend on the ingenuity of air law practitioners.

APPENDIX*

TABLE I
Worldwide Skyjacking Totals
(to 8-1-72)

1948-60:	28	1967:	5
1961:	6	1968:	30
1962:	2	1969:	65
1963:	1	1970:	46
1964:	1	1971:	28
1965:	1	1972:	28

TABLE II
Top Ten Nations
(to 4-1-72)

A. *HIJACKINGS: BY STATE OR AIRCRAFT REGISTRY (since 1948)*		*B.* *RECIPIENT LANDING STATE (since 1970)*	
United States	100	Cuba	51
Columbia	15	Egypt	5
Czechoslovakia	9	Algeria	3
Cuba	7	Syria	3
Argentina	6	W. Germany	3
Mexico	6	Jordan	2
Brazil	5	Denmark	2
Greece	5	N. Korea	2
Poland	5	N. Vietnam	2
Venezuela	5	Turkey	2
Thirty-three other States	58	Seventeen other States	27

* Compiled from N.Y. Times, *Cumulative Index* 1969, 1970, 1971, 1972; Evans, *Aircraft Hijackings: Its Cause and Cure*, 63 AM. J. INT'L L. 695, 697-98 (1969).

TABLE III

Skyjacker Profile
(since 1970)

A. *TYPE OF SKYJACKER*	
single man	57
two or more men	26
two or more men/women	8
man, woman, child	4
man and woman	4
woman and child	1
single woman	1
single boy	1

B. *TYPE OF COERCION* *(often combined)*	
pistol	80
rifle	3
automatic weapon	3
bomb	5
grenade	6
other explosives	17
gasoline	3
knife	4
razor	1
sword	1

TABLE IV

United States Skyjacking Totals

Air Carrier	*1961-67*	*1968-70*	*1971*	*3-Mos. 1972*	*TOTALS*
All Carriers	21	54	19	6	100
National	Unknown	13	3	0	16
TWA	Unknown	8	3	1	12
Eastern	Unknown	7	3	0	10
Delta	Unknown	6	1	0	7
Pan Am	Unknown	6	1	0	7
United	Unknown	5	1	0	6
Northwest	Unknown	1	2	1	4
American	Unknown	1	1	0	2
Northeast	Unknown	2	0	0	2
N.W. Orient	Unknown	1	1	0	2
Air Hughes West	Unknown	0	0	1	1
Allegheny	Unknown	1	0	0	1
Braniff	Unknown	0	1	0	1
Chalk Int'l	Unknown	0	0	1	1
Continental	Unknown	1	0	0	1
Mohawk	Unknown	0	0	1	1
Southeast	Unknown	1	0	0	1
Trans Caribbean	Unknown	1	0	0	1
Tortugas Airways	Unknown	0	0	1	1
Wein Consolidated	Unknown	0	1	0	1
Western	Unknown	0	1	0	1